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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOSEPH TESTA and ANTHONY SENTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 241, which prohibits conspiracies to interfere with citizens in the exercise of rights "secured to them by the Constitution and the laws of the United States," can be construed to extend to interference with persons about to provide information concerning a stolen car ring to *state* authorities?

2. Whether the court of appeals was correct in holding – for the first time since enactment of § 241 in 1870 – that the mere theoretical possibility an act could be prosecuted as a federal crime is sufficient to invoke federal jurisdiction over interference with a witness to that act, even if there was no federal proceeding pending or prospective and no evidence that the conspirators believed the victim could be a witness in a federal proceeding?

3. Did an appellate judgment holding that the evidence was legally insufficient to support a codefendant's conviction under § 241 bar retrial of Petitioners as to whom the same jury had been unable to reach a verdict, where the appellate judgment necessarily established that the evidence against Petitioners was also insufficient?

4. Whether the sheer length, size and complexity of a criminal trial can ever deny defendants due process and, if so, whether Petitioners made a sufficient showing to substantiate such a claim in this case?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

In addition to Petitioners, the parties to the proceeding in the court below were Salvatore Mangialino, Ronald Ustica, Carlo Profeta, Douglas Rega, Judith Hellman, Wayne Hellman and Sol Hellman.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The court of appeals filed two simultaneous opinions, one for publication and reported at 954 F.2d 839, the other a summary order not reported. These opinions are reprinted in the appendix at App. 1 and App. 17, respectively. The court of appeals filed an earlier opinion on Petitioners' interlocutory appeal. That opinion is reported

at 847 F.2d 42 and is reprinted at App. 34. The district court's opinion on the issue which was the subject of the interlocutory appeal is unreported and is reprinted in the appendix at App. 54.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1992, and Petitioners' petition for rehearing was denied on March 16, 1992. This petition for a writ of certiorari is filed within ninety days of the order denying rehearing, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property, without due process of law. . . .

Section 241 of Title 18 of the United States Code provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen[1] in

[1] Subsequent to the times relevant to this case, Section 241 was amended to change the term "citizen" to "inhabitant of any State, Territory, or District."

> the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> . . . .
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

STATEMENT OF THE CASE

1. Petitioners and 22 others were named in a 78-count federal indictment charging them with RICO violations, based on a pattern of racketeering activity consisting of 88 racketeering acts, and a wide variety of other federal offenses, such as kidnapping, loansharking, interstate transportation of stolen cars, foreign travel in aid of racketeering enterprises, mail fraud, wire fraud and conspiracy to distribute and possess with intent to distribute controlled substances. Among the particular charges against Petitioners herein, as well as codefendants Ronald Ustica and Henry Borelli, was a violation of 18 U.S.C. § 241, the federal civil rights criminal conspiracy statute. Specifically, Petitioners, Ustica and Borelli were charged with conspiring to murder citizens, namely, Ronald Falcaro and Khaled Daoud, in the free exercise of their right to be witnesses against the defendants, which conspiracy resulted in the deaths of Falcaro and Daoud. The Government maintained that Falcaro and Daoud were killed because the defendants suspected that they were going to

inform local law enforcement authorities about the defendants' stolen car ring.

Because of the size and complexity of the indictment, the district court severed it into a number of separate parts for successive trials. The first portion of the indictment that proceeded to trial involved the stolen car charges and the conspiracy to deprive Falcaro and Daoud of their civil rights. At the close of the prosecution's case, Petitioners and codefendants Ustica and Borelli moved under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on the grounds that the Government had failed to prove an essential element of the civil rights conspiracy charge, that Falcaro and Daoud were American citizens. The court denied the motion, agreeing with the Government that such citizenship was not an element of the offense.

Petitioners were thereafter acquitted of the stolen car charges, but the jury was unable to reach a verdict on the civil rights conspiracy and a mistrial was declared on that count as to Petitioners. Ustica and Borelli, however, were convicted of the civil rights conspiracy. On Ustica and Borelli's appeal from their judgments of conviction, the court of appeals held that American citizenship of the victim is an essential element of the crime; Daoud was not such a citizen; no rational juror could have found Falcaro to be a citizen beyond a reasonable doubt; and, consequently, the trial evidence was "insufficient as a matter of law to support the conviction of appellants Borelli and Ustica beyond a reasonable doubt." *United States v. Gaggi*, 811 F.2d 47, 58 (1987).

2. In the district court the case was now assigned to a different judge who, over the remaining ten defendants' strenuous objection, rejected the previous judge's approach in severing the case for separate trials and directed that the entire balance of the indictment, including the giant RICO allegations and the many non-RICO charges, proceed to trial together. In addition, the Government moved to retry Petitioners and Ustica on the civil rights conspiracy count. The district court granted the motion over the objections of Petitioners and Ustica that retrial would violate the Double Jeopardy Clause and principles of collateral estoppel. (App. 54)

Petitioners and Ustica thereupon brought an interlocutory appeal. The court of appeals reversed the district court's order as to Ustica, on authority of *Burks v. United States*, 437 U.S. 1 (1978), since his conviction had been reversed for insufficient evidence, but the court affirmed as to Petitioners, on authority of *Richardson v. United States*, 468 U.S. 317 (1984), since the jury had not found them guilty, resulting in a mistrial. (App. 34)

The second trial lasted 17 months – although the Government had represented to the district court that it would take only four to six months – involved 207 witnesses and generated a trial transcript of 32,000 pages. Evidence was introduced relating to two RICO counts, consisting of 57 separate racketeering acts, and 21 non-RICO counts. Evidence of no fewer than 15 independent conspiracies was presented to the jury. Summations lasted ten days. The jury charge extended over three days and included instructions on 40 different statutes and 371 principles of law – elements of the various crimes, definitions and special rules of application. Nevertheless, the

jury delivered across-the-board guilty verdicts on each and every one of the 19 counts and 41 racketeering acts submitted to it, indiscriminately finding each defendant guilty of every count and every racketeering act relating to that defendant – 191 out of 191 determinations.

Petitioners were sentenced to life imprisonment for the civil rights conspiracy count[2] and concurrent twenty year terms on the remaining counts.

3. Petitioners contended on appeal from their judgments of conviction that there was no federal jurisdiction over the § 241 civil rights conspiracy count since informing *state* authorities of the commission of a crime is not a "right or privilege secured by the Constitution or laws of the United States" and the evidence established, at most, that the defendants suspected, correctly, that Falcaro and Daoud were going to inform local New York law enforcement authorities about the stolen car ring, namely, the Kings County District Attorney's Office, the "auto squad," or the Nassau County District Attorney's Office. Petitioners maintained that federal jurisdiction was lacking because there was neither evidence that a federal proceeding was pending or prospective nor evidence that Petitioners feared one was or might be. Petitioners argued that it was not enough, as the district court had instructed the jury over objection, that Falcaro and Daoud had knowledge of acts which *could* be prosecuted as

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[2] At the second trial the Government introduced Falcaro's birth certificate, establishing that he was indeed a United States citizen. It was conceded that Daoud was not.

federal crimes.[3] Petitioners also contended on appeal that the sheer length, size and complexity of the second trial put it beyond the jury's ability to absorb, so prejudicing Petitioners that they were denied due process of law.

The court of appeals rejected both arguments. The court held that the right to be a witness in a federal proceeding attaches at the time a person becomes possessed of knowledge sufficient to create the *potential* of becoming a federal witness and that § 241 is properly invoked if a defendant harms that person with intent to prevent him from disseminating his knowledge of those facts even to local authorities "anytime or anywhere whether or not there was imminent contact between [the victim] and federal authorities." (App. 13-14)

As to the length, size and complexity of the trial, the court of appeals labelled as sheer speculation Petitioners' claim that the case was beyond the jury's capacity to understand, holding that the district court did not abuse

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[3] The court instructed the jury:

> It is only necessary that at the time the alleged agreement to injure was made it was possible or it was foreseeable that the person with respect to whom the agreement was made – in other words, the subject of the conspiracy – could have become a federal witness if a trial or proceeding was eventually to take place. It's enough, therefore, that the subject of the alleged conspiracy had knowledge of acts which could be prosecuted as federal crimes, such as interstate transportation of stolen property, and that the defendants were afraid that the information which the alleged subject of the conspiracy had would be revealed to the authorities. (Trial tr. at 31119-20)

its discretion in trying all the charges at once. (App. 5-6) The court indicated that there can be no due process violation "without a showing that the issues were *actually* beyond the jury's competence." (App. 5; emphasis added.)

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS HAS IMPROPERLY EXPANDED THE SCOPE OF 18 U.S.C. § 241 AND EXTENDED FEDERAL JURISDICTION TO EMBRACE LOCAL CRIMES HAVING NO CONCRETE FEDERAL NEXUS.

1. This case involves a question of exceptional importance because the court of appeals' decision has expanded to unprecedented and unwise proportions the scope of the federal civil rights criminal conspiracy statute, 18 U.S.C. § 241, and has extended federal jurisdiction to local crimes having no concrete federal nexus.

Since the enactment of § 241 in 1870, this is the first case to hold that the mere theoretical possibility that an act could be prosecuted as a federal crime, without more, is sufficient to invoke federal jurisdiction over interference with the rights of a witness to that act – even if no federal proceeding was pending or prospective and even if there is no evidence that the conspirators believed the victim could be a witness in a federal proceeding. In every previous reported case involving interference with the right to be a federal witness, there has been solid evidence establishing a concrete federal nexus: express

proof that a pending, prospective or feared proceeding was or would be a specifically federal one. *See, e.g., Motes v. United States,* 178 U.S. 458, 462-63 (1900) (murdering victim for informing United States Commissioner about Internal Revenue Service violations); *In re Quarles,* 158 U.S. 532, 537-38 (1895) (victim informed United States deputy Marshal about Internal Revenue Service violations); *United States v. Smith,* 623 F.2d 627 (9th Cir. 1980) (preventing victim from acting as an informer and testifying in a federal case). The court of appeals' holding in this case, on the other hand, rests federal jurisdiction on nothing less ethereal than a person's mere knowledge of an act that is theoretically prosecutable as a federal crime.

Petitioners contended on appeal that there was no federal jurisdiction for their conviction under § 241, because the evidence at trial showed only that the defendants feared, correctly as it turned out, that the victim was about to provide information about stolen cars to *state* law enforcement entities. The court of appeals, analyzing this issue solely as one claiming a failure of proof on an element of the crime, i.e., the defendants' intent, held that it was not a requisite element of § 241 that the defendants acted with the intent to interfere with the victim's right to be specifically a federal witness. (App. 12-13)

That holding, accepting it as correct, does not answer the jurisdictional question. *Cf. United States v. Feola,* 420 U.S. 671, 695-96 (1975) (18 U.S.C. § 111 does not require as element of crime proof that defendant knew victim was federal officer, but in conspiracy prosecution "whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the

existence of federal jurisdiction"). Indeed, Petitioners *conceded* in the court of appeals that if there was evidence that a federal proceeding was pending or prospective, federal jurisdiction would attach even if the conspirators did not know of the federal proceeding. (Pet. C.A. Reply Br. at 3) They maintained, however, that if no federal proceeding was actually pending or prospective, then federal jurisdiction attached only if the conspirators believed or feared one was or might be. In other words, there must be *some* concrete federal nexus: *either* that a federal proceeding was actually pending or prospective *or* evidence that the conspirators acted in the belief that such a federal proceeding might be pending or prospective.

Without casting its holding in jurisdictional terms, the court of appeals held that for a violation of § 241 it is not necessary that the victim "was actually likely to become specifically a federal witness" nor was it necessary that the conspirators had knowledge that the victim possessed that specific federal right. (App. 13) Rather, proof of a violation of § 241 – and, *sub silentio*, federal jurisdiction to prosecute – is established merely if the conspirators knew of their implication in an act which could theoretically be charged as a federal offense, even if they did not realize it; knew that the putative victim also had knowledge of this act; and conspired specifically to interfere with his providing information about the act to authorities, even local authorities, "anytime or anywhere whether or not there was imminent contact between [the victim] and federal authorities." (App. 13-14).

2. None of the cases cited by the court of appeals supports its expansive interpretation of § 241. In *United*

States v. Harvey, 526 F.2d 529 (2d Cir. 1975), relied on most heavily by the court, the conspirators, arrested on state burglary charges, plotted against the witness for *the express reason* that they "might be facing federal charges" if the Government learned from him that they had transported dynamite across state lines for use in the burglary. *Id.* at 533. In *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974), the victim had been a federal grand jury witness and had been subpoenaed to be a witness for the Government at the defendant's trial. *Id.* at 1110. The cases cited as analogies by the court of appeals for the proposition that a defendant need not know the federal implications of his conduct, *United States v. Yermian*, 468 U.S. 63 (1984) (false statement on Department of Defense security questionnaire); *United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976) (Section 242 violation where corrupt police officers, acting under color of law, deprived victims of property without due process of law), are inapposite since the basis of federal jurisdiction in those cases is clear.

The court of appeals' unprecedented expansion of § 241 on the basis of theoretical possibilities alone is not only unsound, *see generally United States v. Kozminski*, 487 U.S. 931, 939 (1988) ("Court must give effect to Congress' expressed intention concerning the scope of conduct prohibited [in § 241]"), but unwise. Today, there remain few, if any, state criminal offenses which could not theoretically be prosecutable under federal law as a violation of the RICO, money laundering, mail fraud or narcotics laws. The court of appeals' holding that § 241 covers interference with the providing of information about such state offenses to authorities – even state authorities –

"anytime or anywhere" opens the gates for the Government to prosecute as federal civil rights violations virtually every instance of witness tampering in a state investigation, actual or prospective. Congress could hardly have intended § 241 to have such scope. Rather, consistent with principles of federalism, Congress has left to the several states the prosecution and punishment of conspiracies to oppress citizens of a state in exercising the right to assist the state in enforcing its laws. As this Court pointed out in *United States v. Bass*, 404 U.S. 336 (1971), "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Id.* at 349; *see also Evans v. United States*, No. 90-6105 (May 26, 1992) (Thomas, J., dissenting), *citing Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991).

Since its enactment 120 years ago, § 241 has been addressed by this Court numerous times, most recently in *United States v. Kozminski*, 487 U.S. 931 (holding that Government cannot prove § 241 conspiracy to violate rights secured by Thirteenth Amendment without proving conspiracy involved use or threatened use of physical or legal coercion). In *Kozminski* the Court acknowledged that Congress intended § 241 to incorporate by reference a large body of potentially evolving law. *Id.* at 941. The Court noted, on the other hand, that "a statute prescribing criminal punishment must be interpreted in a manner that provides a definite standard of guilt." *Id.* The Court pointed out that it had . . .

> . . . resolved the tension between these two propositions by construing § 241 to prohibit only intentional interference with *rights made specific* either by the express terms of the Federal

> Constitution or laws or by decisions interpreting them.

Id. (emphasis added), *citing, United States v. Price*, 383 U.S. 787, 806 n. 20 (1966); *United States v. Guest*, 383 U.S. 745, 754-55 (1966); *Screws v. United States*, 325 U.S. 91, 102 (1945). Thus, although the Court in *Guest* had stated that "when § 241 speaks of 'any right or privilege secured . . . by the Constitution or laws of the United States,' it means precisely that," 383 U.S. at 753, the Court subsequently made clear in *Kozminski* that this broad statement is not without a limiting principle: the statute prohibits "only intentional interference with rights made specific either by the express terms of the Federal Constitution or laws or by decisions interpreting them." No constitutional provision, law or decision has ever made informing state officials of the commission of a crime such a specific right, until the court of appeals did so here.[4]

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[4] It is open to question whether a person has a "civil right," under New York law, to be an informer or witness with respect to state offenses. In *Morgan v. Null*, 117 F.Supp. 11 (S.D.N.Y. 1953), the complaint alleged a conspiracy "to injure and oppress plaintiff and to deprive her of her civil rights and equal protection of the laws in that [the defendants] would and did deprive plaintiff of her right and privilege to submit to a lawfully constituted grand jury, information on public official misconduct. . . . " Judge Weinfeld, after observing that "[n]o specific Federal Constitutional or statutory provision grants one the right or privilege to submit to a state grand jury information with respect to state offenses," *id.* at 13, and after reviewing applicable New York law, dismissed the claim, concluding:

(Continued on following page)

Certiorari should therefore be granted because principles of federalism become ephemeral when lower courts feel free to define federal rights in terms so broad and speculative that almost no conduct could fall outside federal jurisdiction under § 241.

II

AN APPELLATE JUDGMENT THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A CO-DEFENDANT'S CONVICTION BARS RETRIAL OF A DEFENDANT AS TO WHOM THE SAME JURY WAS UNABLE TO REACH A VERDICT, WHERE THE APPELLATE JUDGMENT NECESSARILY ESTABLISHES THAT THE EVIDENCE AGAINST THE DEFENDANT WAS ALSO INSUFFICIENT.

Petitioners were retried on the civil rights conspiracy count despite the fact that the court of appeals had held that the prosecution's proof at the first trial against codefendants Ustica and Borelli – and necessarily against

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(Continued from previous page)

> Thus, it is clear that there is no right either under the New York State Constitution, any of its statutes, or by its recognized common law which grants individuals a right to submit information to a grand jury. Since no such right or privilege exists in New York State, plaintiff has been treated no differently from any other citizen of the state and has not been discriminated against nor denied the equal protection of its laws.

Id. at 16; *cf. Hack v. Oxford Health Care*, 562 F.Supp. 295, 300-01 (N.D. Ind. 1983) (right to petition state government is not a right inherent in national citizenship so that a violation thereof can form basis of Section 1985 claim).

Petitioners – was insufficient as a matter of law because the Government had failed to prove that the victims of that conspiracy were American citizens.

The question presented falls in a gap left by two of the Court's cases applying the Double Jeopardy Clause: *Burks v. United States*, 437 U.S. 1, and *Richardson v. United States*, 468 U.S. 317. In *Burks* the Court held that, after reversal of a conviction on the ground that the evidence presented at the first trial was legally insufficient, the Double Jeopardy Clause bars retrial, because the Government, given a fair opportunity, failed to develop a case that warranted submission to a jury. 437 U.S. at 16-18. In *Richardson*, the Court held that, even if a defendant *claims* there was legally insufficient evidence to convict him at the first trial, retrial following a hung jury does not violate the Double Jeopardy Clause because "a trial declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected." 468 U.S. at 326. Here, the court of appeals, relying on *Richardson*, held that Petitioners could not invoke the Double Jeopardy Clause since a mistrial was declared in their case. (App. 48-50) The circumstances and procedural posture of this case, however, are significantly different from those in *Richardson*.

Richardson had been acquitted on one count of a three-count indictment, but the jury was unable to agree on the other two. The district court declared a mistrial, ordered a retrial, and denied Richardson's motion for judgment of acquittal based on legal insufficiency of the evidence and his contemporaneous motion to bar the retrial on double jeopardy grounds. 468 U.S. at 319. Richardson brought an interlocutory appeal "seek[ing] review

of the sufficiency of the evidence at his first trial. . . . " *Id.* at 322. The court of appeals dismissed Richardson's interlocutory appeal due to lack of jurisdiction. This Court granted certiorari, but held that Richardson had no valid double jeopardy claim.[5]

Significantly, in *Richardson* neither the court of appeals nor this Court ever assessed the sufficiency of the evidence or found it to be in fact legally insufficient. Richardson merely claimed it was. *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984) ("Lydon's *claim* of evidentiary failure and a *legal judgment* to that effect therefore have different consequences under the Double Jeopardy Clause") (emphasis added).

Richardson's double jeopardy claim relied on *Burks*. The Court noted, however, that it has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." 468 U.S. at 324. In harmonizing this rule with *Burks* the Court stated:

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[5] The Court further held that double jeopardy claims like Richardson's would no longer be considered "colorable," *see United States v. MacDonald*, 435 U.S. 850, 862 (1978), and therefore could no longer be appealed before final judgment. 468 U.S. at 326 n. 6. Petitioners' appeal was not like Richardson's because it did not seek to have the appellate court canvass the sufficiency of the evidence at the first trial. *See id.* at 321-322. Rather, it sought to have the court of appeals' prior adjudication of the legal insufficiency of the evidence applied to a collateral claim of double jeopardy. Petitioners therefore raised a colorable double jeopardy claim entitled to interlocutory review under 28 U.S.C. § 1291. *See Abney v. United States*, 431 U.S. 651 (1977).

> We think that the principles governing our decision in *Burks*, and the principles governing our decision in the hung jury cases, are readily reconciled when we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been *some event, such as an acquittal,* which terminates the original jeopardy.

Id. at 325 (emphasis added). In *Richardson* no acquittal-like "event" had occurred. The Court rejected Richardson's contention that the mere declaration of a mistrial was such an event. *Id.* at 325. Here, however, unlike in *Richardson*, "some event" did occur, namely the court of appeals' judgment that the evidence at the first trial was insufficient as a matter of law. Since "an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal," *Richardson*, 468 U.S. at 325, the court of appeals' judgment is "some event, such as an acquittal."

In view of the foregoing, *Burks* and *Richardson* should have been read together to bar retrial of Petitioners. The *Richardson* Court noted that "*Burks* simply does not *require* an appellate court to rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause." 468 U.S. at 323 (emphasis added); *see also United States v. Brack*, 74 F.2d 1142, 1148 (7th Cir. 1984) (under *Richardson* defendant may not seek review of sufficiency of evidence at first trial). Here, of course, no such question was presented, because the court of appeals had already ruled on the sufficiency of the evidence. *Richardson* should not have been interpreted as requiring judicial blinders to that judgment.

In *Burks* the Court noted that, since absolute finality is necessarily afforded to a jury's verdict of acquittal – no matter how erroneous its decision – "it is difficult to see how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." 437 U.S. at 16. It was therefore anomalous to permit retrial of Petitioners here.

Since the court of appeals correctly held in light of *Burks* that Ustica, a codefendant whom the jury had found guilty, could not be retried, the anomaly of retrying Petitioners was even greater. Surely defendants as to whom a jury is deadlocked should not be put in a *worse* position than one whom the jury has convicted. To conclude, as the court of appeals necessarily did, that Petitioners could not be retried if they had been found guilty – since the evidence was insufficient as a matter of law – but could be retried because they were *not* found guilty applies *Richardson* in an absurdly absolute way that this Court could not have intended.

Richardson is not so absolute as to permit retrial in every case in which there is a hung jury. *Richardson* simply does not encompass every circumstance. For example, Rule 29(c) of the Federal Rules of Criminal Procedure authorizes the district court to enter a judgment of acquittal after the jury is discharged without having returned a verdict, if the evidence was insufficient to sustain a conviction. It is clear that the Government is not free to retry a defendant under such circumstances. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (Double Jeopardy Clause bars retrial where court grants Rule 29 motion following hung jury). So too here,

where there was an appellate judgment establishing the insufficiency of the evidence at the first trial – a circumstance not likely contemplated by the *Richardson* Court – retrial should have been barred.[6]

This Court should therefore grant certiorari to make clear that *Richardson* must be evaluated in a commonsense fashion in light of the circumstances of each case.

III

THE EXTRAORDINARY LENGTH, SIZE AND COMPLEXITY OF PETITIONERS' TRIAL RENDERED THE CASE BEYOND THE JURORS' CAPACITY TO ABSORB AND TO ASSESS INTELLIGENTLY, THEREBY DENYING PETITIONERS DUE PROCESS.

The question presented asks the Court to decide whether the sheer length, size and complexity of a criminal trial can *ever* deny defendants due process and, if so, what showing a defendant must make to substantiate such a claim.

Here, Petitioners showed that the second trial lasted 17 months – although the Government had represented to the district court that it would take only four to six months – involved 207 witnesses and generated a trial

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[6] Since the Government had failed to prove that the victims of the conspiracy were American citizens and had had a full and fair opportunity to litigate that issue in the court of appeals, which decided the issue squarely against the Government, principles of collateral estoppel also dictated against permitting the Government another opportunity to make its case at a retrial. *See Ashe v. Swenson*, 431 U.S. 436 (1970).

transcript of 32,000 pages; evidence was introduced relating to two RICO counts, consisting of 57 separate racketeering acts, and 21 non-RICO counts, including no fewer than 15 independent conspiracies; summations required ten days to deliver; the jury charge extended over three days and included instructions on 40 different statutes and 371 principles of law – elements of the various crimes, definitions and special rules of application; and the jury delivered across-the-board guilty verdicts on each and every one of the 19 counts and 41 racketeering acts submitted to it, indiscriminately finding each defendant guilty of every count and every racketeering act relating to that defendant – voting for the prosecution 191 out of 191 times.

Short of juror affidavits impermissibly impeaching their own verdict, *see* Federal Rule of Evidence 606(b), Petitioners could hardly have shown more. Their showing is potent circumstantial evidence that this trial was beyond this jury's, or any jury's, grasp. The blanket verdicts alone strongly suggest that the jurors, or at least some of them, threw up their hands at the impossible prospect of sorting through the evidence as to each defendant and applying the law to the myriad facts, but, instead, simply voted on the basis of a visceral, communal conclusion that the defendants must all be guilty of everything. Indeed, the court of appeals had observed in an earlier, less complex case raising a similar claim that "[t]he clearest indication that the jury was able to evaluate the evidence, despite its being voluminous, is provided by the jury's verdicts themselves," since "a mix of guilty and not guilty verdicts is some indication that the jury was able to sift through voluminous evidence and

differentiate among various defendants" and "[h]ere, the jury's not guilty verdicts on certain counts inform us that the jury differentiated among the defendants." *United States v. Casamento*, 887 F.2d 1141, 1150 (2d Cir. 1989).[7]

Nevertheless, here the court of appeals dismissed as "sheer speculation" Petitioners' claim that the extraordinary length, size and complexity of their trial rendered the case beyond the jurors' capacity to absorb and to assess intelligently.[8] (App. 6) The court also indicated that there can be no due process violation "without a showing that the issues were *actually* beyond the jury's competence." (App. 5; emphasis added.) Petitioners' claim was "speculation," however, only in the sense that reasonable inferences from evidence can be termed speculation. The court of appeals' view, which seemingly requires an impossible showing of conclusive evidence that a jury was overwhelmed, in effect constitutes a bar to *any* claim that a

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[7] The *Casamento* case did not involve RICO allegations. It has been pointed out that in RICO trials involving various and sundry racketeering acts, as here, the jury "must apply the highly technical and counter-intuitive RICO conspiracy elements to a great range of disparate predicate conspiracies and events." *United States v. Gallo*, 668 F.Supp. 736, 750 (E.D.N.Y. 1987).

[8] The court of appeals disposed of Petitioners' claim by holding that the district court, in trying all the charges at once, did not "abuse its discretion." (App. 5) A judge's exercise of discretion in a severance context is "virtually unreviewable." *United States v. Friedman*, 854 F.2d 535, 563 (2d Cir. 1988). But "abuse of discretion" was assuredly an inappropriate standard under the circumstances of this case, because at the time the judge determined the charges could be tried together he had been led by the Government to believe that the trial would last four to six months.

trial's length, size and complexity can put it beyond a jury's reach and deny defendants due process. This Court should therefore grant certiorari and decide if Petitioners made a sufficient showing in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 12, 1992

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 9, 7, 8, 11, 10, 15, 13, 12, 14 – August Term, 1991

(Argued: September 23, 1991
Decided: January 22, 1992)

Docket Nos. 89-1458, 89-1459, 89-1527, 89-1537, 89-1550, 89-1556, 90-1229, 90-1230, 90-1263

UNITED STATES OF AMERICA,

Appellee,

–v.–

DINOME, et al.,

Defendants,

SALVATORE MANGIALINO, ANTHONY SENTER, JOSEPH TESTA, RONALD USTICA, CARLO PROFETA, a/k/a CARLOS a/k/a CARMELLO, DOUGLAS REGA, JUDITH MAY HELLMAN, WAYNE HELLMAN, AND SOL HELLMAN,

Defendants-Appellants.

Before:

WINTER and ALTIMARI, *Circuit Judges,*
and POLLACK, *District Judge.**

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* The Hon. Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a decision of the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*), after a jury trial, convicting appellants of a host of crimes, including RICO substantive violations, RICO conspiracy, civil rights murder, loansharking conspiracy, extortion, firearms conspiracy, narcotics conspiracy, and mail and wire fraud.

Affirmed as to all appellants except Wayne and Judith May Hellman. Reversed as to the Hellmans.

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DAVID COOPER, New York, New York, *for Defendant-Appellant Judith May Hellman.*

Lorin Duckman, New York, New York, *for Defendant-Appellant Wayne Hellman.*

Jay Gregory Horlick, Brooklyn, New York, *for Defendant-Appellant Sol Hellman.*

J. Gilmore Childers, Assistant United States Attorney, New York, New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, Miguel A. Estrada, James A. Goldston, Michele Hirshman, Cari Robinson, Cathy Seibel, Daniel C. Richman, Helen Gredd, Assistant United States Attorneys, New York, New York, of counsel), *for Appellee.*

Winter, *Circuit Judge:*

This is an appeal arising out of a sixteen-month jury trial involving a host of racketeering and other criminal charges, detailed in the margin,[1] based on the activities of

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[1] Appellants, with the exception of Wayne and Judith May Hellman, were convicted of engaging in a racketeering enterprise in violation of 18 U.S.C. § 1962(c) (1988) and conspiring to engage in such an enterprise in violation of 18 U.S.C. § 1962(d) (1988). Additionally, various appellants were convicted of the murder of a federal witness in violation of 18 U.S.C. § 241 (1988), conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892 (1988), conspiracy to collect extensions of credit by extortionate means in violation of 18 U.S.C. § 894 (1988), mail and wire fraud in violation of 18 U.S.C. § 1341, 1343 (1988), extortion in violation of 18 U.S.C. § 1951 (1988), conspiracy to commit firearms violations in violation of 18 U.S.C. § 371 (1988), conspiracy to possess and distribute marijuana and cocaine in violation of 21 U.S.C. § 846 (1988), and possession and distribution of narcotics in violation of 21 U.S.C. § 841 (1988).

the so-called DeMeo Crew, a component of the Gambino organized crime family. Over 1000 pages of briefs have been filed raising dozens of common and individual claims of error. Except for those raised by Wayne and Judith Hellman, every such claim is meritless. Indeed, all but a few are so meritless that we dispose of the great bulk of them in a summary order, filed simultaneously with this opinion, pursuant to our Local Rule § 0.23. This published opinion is limited to a discussion of certain claims common to all appellants, the reasons for a reversal as to two appellants, and certain arguments raised with regard to convictions for a civil rights murder.

Appellants Testa, Senter, Mangialino, Profeta, Ustica, Rega, and the now-deceased Sol Hellman[2] were either members of, or persons demonstrated to have ongoing relations with, the DeMeo Crew. Appellants Wayne and Judith May Hellman were the son and daughter-in-law of Sol Hellman. The DeMeo Crew engaged in a vast array of illegal activities, including kidnapping, loansharking, narcotics distribution, pornography, extortion, firearms conspiracy, and the operation of an international stolen car ring. From the early 1970's to the 1980's, these activities were furthered by calculated violence, including the brutal murders of various persons viewed by the Crew as a threat to their business. Eventually, the Crew's leader, Roy DeMeo, was himself murdered.

A seventy-eight count indictment charged twenty-four persons with various crimes in connection with the

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[2] Sol Hellman died while this appeal was pending. His convictions have been vacated.

activities of the DeMeo Crew. A number of the charges in the original indictment were severed, and an initial trial was held on non-RICO auto theft and exportation charges. A second trial addressed the RICO and remaining substantive charges. This appeal arises from the convictions in the second trial.

A. *Length and Complexity of Trial*

Appellants argue that the length of the trial, the complexity of the factual and legal issues, and the sheer numbers of defendants, witnesses, and crimes charged, denied them a fair trial. In this regard, they rely principally on *United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989), *cert. denied,* 493 U.S. 1081 (1990), in which we expressed "misgivings about trials of [a similar] magnitude." *See id.* at 1151. However, we also "recognize[d] that district judges must retain a considerable degree of discretion in determining whether, on balance, the fair administration of justice will be better served by one aggregate trial of all indicted defendants or by two or more trials of groups of defendants." *Id.; United States v. Chang An-Lo,* 851 F.2d 547, 566 (2d Cir.), *cert. denied,* 488 U.S. 966 (1988). A district court's denial of a motion to sever will, therefore, be reversed only upon a showing that the district court clearly abused its discretion. *Id.; Casamento,* 887 F.2d at 1149.

There is no support in caselaw or in logic for the proposition that a lengthy trial, a large number and variety of charges, and numerous defendants violate due process without a showing that the issues were actually beyond the jury's competence. No such showing was

made in the instant matter. The crimes here may have been large in number and variety, but they were rather ordinary in nature, except in their viciousness. The evidence could also be understood without difficulty, the alleged complexity stemming more from the abundance of evidence than from the subtlety of the analysis needed to consider it.

The claim that the jury must have lacked the capacity to understand the instructions given it is thus sheer speculation. As we stated in *Casamento*,

> Although the jury had to evaluate a tremendous amount of evidence, the nature of the evidence and the legal concepts involved in the case were not extraordinarily difficult to comprehend, as they might be, for example, in a complex antitrust case involving abstruse economic theories or an employment discrimination case involving technical statistical evidence and formulae.

887 F.2d at 1150. The voluminous body of evidence, the careful instructions of the trial judge regarding the right of each defendant to individualized consideration, the opportunity afforded the jurors to take notes throughout the trial, the outline of the elements of the offenses provided by the judge to the jurors, the numerous requests for readbacks, the length of the deliberations, and the absence of any concrete evidence of unusual juror confusion, reinforce our conclusion that the jury comprehended the case.

B. *"Spillover" Prejudice*

Many appellants claim error in so-called "spillover" prejudice resulting from the admission of evidence of violent activities engaged in by other members and associates of the DeMeo Crew. Separate trials, they assert, would have avoided this prejudice.

The particular claims of each defendant regarding spillover prejudice are addressed in the summary order. However, we note here that the government must prove an enterprise and a pattern of racketeering activity as elements of a RICO violation. 18 U.S.C. § 1962(c). Proof of these elements may well entail evidence of numerous criminal acts by a variety of persons, and each defendant in a RICO case may reasonably claim no direct participation in some of those acts. Nevertheless, evidence of those acts is relevant to the RICO charges against each defendant, and the claim that separate trials would eliminate the so-called spillover prejudice is at least overstated if not entirely meritless.

In the present case, the evidence of numerous crimes, including the routine resort to vicious and deadly force to eliminate human obstacles, was relevant to the charges against each defendant because it tended to prove the existence and nature of the RICO enterprise, the DeMeo Crew. Such evidence was also relevant to prove a pattern of racketeering activity by each defendant. *See United States v. Friedman*, 854 F.2d 535, 563 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). As we stated in *United States v. Indelicato*,

> In some cases both the relatedness and the continuity necessary to show a RICO pattern

> may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise. The nature of the enterprise may also serve to show the threat of continuing activity. Where the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity. . . . We do not suggest- . . . that the defendant is to be held accountable for the racketeering acts of others. We simply note that such an association may reveal the threat of continued racketeering activity and thereby help to establish that the defendant's own acts constitute a pattern within the meaning of RICO.

865 F.2d 1370, 1383-84 (2d Cir. 1989) (en banc). The evidence of the DeMeo Crew's various criminal activities was, therefore, relevant to the RICO charges against each appellant – save Wayne and Judith Hellman, for reasons discussed *infra* – because it tended to prove: (i) the existence and nature of the RICO enterprise and (ii) a pattern of racketeering activity on the part of each defendant by providing the requisite relationship and continuity of illegal activities.

Appellants' "spillover" claim is thus misnamed. The typical spillover claim is that evidence admissible against only one defendant is prejudicial to all defendants and that individual trials should have been held to avoid that prejudice. *See, e.g., United States v. Cervone*, 907 F.2d 322, 341-42 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 680 (1991). In the present case, however, the evidence in question is

relevant to the RICO charges against all defendants and most probably would have been admitted even if defendants had been accorded individual trials. *See United States v. Villegas*, 899 F.2d 1324, 1347 (2d Cir.), *cert. denied*, 111 S. Ct. 535 (1990); *Casamento*, 887 F.2d at 1153.

Presumably, a RICO defendant could stipulate that the charged RICO enterprise existed and that the predicate acts, if proven, constituted the requisite pattern of racketeering activity. The evidence of crimes by others might then be excluded, and the defense would stand or fall on the proof concerning the predicate acts charged against the particular defendant. No such stipulation was entered into in the instant matter, however.

The only limit on the admission of evidence as to the crimes in question, therefore, lies in the claims by particular defendants that the probative value of such evidence as to them was outweighed by its prejudicial impact under Fed. R. Evid. 403. Such claims must surmount considerable obstacles on an appeal, however, because the evidence in question is directly relevant to two elements of a RICO violation and its admission is a largely discretionary matter on the part of the district court. In the instant case, the particular Rule 403 claims barely confront, much less surmount, these obstacles, and our discussion of them is contained in the summary order.

C. *The Hellmans' Mail and Wire Fraud Convictions*

However, there are two appellants against whom none of the evidence relating to the alleged RICO enterprise was admissible, and we reverse their convictions. Wayne and Judith May Hellman ("the Hellmans") were

tried along with the other appellants on both the RICO bribery charges and the mail and wire fraud charges. The government sought to link the Hellmans to the DeMeo Crew by theorizing that Judith had been bribed for her efforts as a juror to secure an acquittal in a state court murder trial of one Anthony Gaggi. The bribe was claimed to have been arranged by Sol Hellman and the DeMeo Crew. The government further contended that the Hellmans used the proceeds of the bribe to purchase a new home. The mail and wire fraud charges grew out of their efforts to obtain loans for that home and for a new car. Near the close of the trial, the Hellmans moved pursuant to Fed. R. Crim. P. 29 for a judgment of acquittal on the RICO and bribery charges and, claiming spillover prejudice, requested a mistrial as to the remaining charges. The Rule 29 motion was granted as to the RICO and bribery charges, but the request for a mistrial was denied. The Hellmans were then convicted of mail and wire fraud. (Wayne Hellman was convicted of extortion, but the district court set this conviction aside.) We believe that a mistrial should have been granted.

A dismissal of charges pursuant to Fed. R. Crim. P. 29 does not require granting a mistrial as to remaining charges unless the dismissed charges were brought in bad faith or the defendants suffered some prejudice as a result of the presence of the now dismissed charges. *Friedman*, 854 F.2d at 581; *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983); *United States v. Losada*, 674 F.2d 167, 170 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982).

We cannot escape the conclusion that the evidence against the Hellmans' codefendants – including vicious

murders, loansharking, auto theft, pornography, and firearms trafficking and the very nature of the DeMeo Crew – was prejudicial to the Hellmans. *See United States v. Branker*, 395 F.2d 881, 887-89 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969) (finding prejudice against some defendants in lengthy trial involving numerous counts unrelated to those defendants). Once the RICO charges against the Hellmans were dismissed, all but an infinitesimal fraction of the evidence at this sixteen-month trial lost any relevance to the mail and wire fraud charges against them. Instead of being swamped by this mass of irrelevant evidence, these charges should have been tried separately.

The government argues that the Hellmans effectively waived their right to a mistrial when they refused the court's earlier offer of a severance. However, as explained *supra*, the RICO-enterprise-related evidence would have been admissible, subject to Rule 403 analysis, against the Hellmans in a severed trial. Once the RICO charges against them were dismissed, the Hellmans stood in a very different posture with respect to the evidence relevant to the RICO charges. That evidence was then irrelevant yet highly prejudicial in the context of the remaining mail and wire fraud charges.

A "trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. . . . [W]here, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). After the granting of their Rule 29 motion on the RICO counts, the Hellmans should have

been severed for a separate trial on the mail and wire fraud counts. Such a trial could have been completed in a very short period of time, with the risk of spillover prejudice entirely eliminated. The Hellmans' mail and wire fraud convictions must thus be reversed. They may of course be retried.

D. *The Civil Rights Murders*

One of the activities of the DeMeo Crew involved exporting late-model, stolen American cars to Kuwait. Ronald Falcaro and Khaled Daoud conducted a competing, but legitimate, venture of exporting cars to Kuwait. Noting the easy availability of vehicles to their competitor, Ronald Ustica, Daoud came to suspect that the DeMeo operation involved stolen cars and began copying down Vehicle Identification Numbers from cars in the DeMeo inventory. This was a fatal mistake because he was observed doing so by Ronald Ustica, the leader of the DeMeo stolen car scheme. Falcaro and Daoud were thereafter lured to a garage in Brooklyn by a false promise that Fred DiNome would sell them a portion of his excess inventory. Once inside the garage, Falcaro and Daoud were murdered by a group of men that included Joseph Testa and Anthony Senter.

Testa and Senter were convicted under 18 U.S.C. § 241 (1988) for Falcaro's murder as a violation of his civil right to be a witness in a federal proceeding. Testa and Senter argue on appeal that an element of proof of this offense was lacking, namely the requirement that Testa and Senter acted with the intent to interfere with Falcaro's right to be specifically a federal witness. Testa and

Senter misconceive the nature of the proof required to establish a violation of 18 U.S.C. § 241.

Section 241 protects, *inter alia*, the right to provide information about federal crimes to authorities, *United States v. Harvey*, 526 F.2d 529, 535 (2d Cir. 1975), *cert. denied*, 424 U.S. 956 (1976), and the right to be a witness in a federal proceeding, *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). Whether Testa and Senter violated Falcaro's rights under Section 241 depends upon whether: (i) Falcaro possessed those civil rights and (ii) Testa and Senter intended to interfere with the exercise of those rights. It is not necessary, however, to show knowledge on their part that Falcaro possessed those specific civil rights or that Falcaro was actually likely to become specifically a federal witness. *Cf. United States v. Yermian*, 468 U.S. 63 (1984) (in prosecution for making false statements in matter within the jurisdiction of federal agency no need to prove knowledge of federal agency jurisdiction); *United States v. McClean*, 528 F.2d 1250, 1255 (2d Cir. 1976) (in prosecution for depriving individual of constitutional rights government does not have to prove specific intent to deprive person of federal right, because "consequences of appellants' conduct must be deemed to have been intended"). Rather, it need only be shown that Testa and Senter: (i) knew of facts that constituted a federal crime in which they were implicated whether or not they knew of its federal implications; (ii) knew that Falcaro possessed evidence regarding their criminality; and (iii) took action

specifically to interfere with his providing that information to authorities or testifying as to that evidence anytime or anywhere whether or not there was imminent contact between Falcaro and federal authorities.

Falcaro clearly possessed the requisite right at the pertinent time. He knew of the scheme to export stolen automobiles to Kuwait, facts that constitute a federal crime. *See* 18 U.S.C. § 2312. The right to be a witness in a federal proceeding attaches at the time such a person is possessed of evidence sufficient to create the potential of becoming a federal witness. *See Harvey*, 526 F.2d at 535 n.6 (victim who possessed knowledge of the interstate source of explosive used to commit crime "was a potential federal witness and accordingly did have the objective right contemplated by the statute"). Testa and Senter knew of the facts constituting the federal crime and of Falcaro's sharing of that knowledge. Their murder of Falcaro was self-evidently intended to prevent him from disseminating his knowledge of those facts, including the provision of information to federal authorities or testimony as a witness in federal criminal proceedings. That Falcaro was at that time not in contact with federal officials neither diminishes his ongoing civil right to testify in a federal proceeding nor excuses Testa's and Senter's intent to prevent testimony anytime and anywhere. The evidence was thus sufficient to prove a violation of Section 241.

Ustica, who, as noted, headed up the scheme to export stolen cars to Kuwait, argues that hearsay statements by Daoud and Falcaro were improperly admitted. The hearsay testimony was offered by Youssef Najjar, Khaled Daoud's brother, and by Daniel Roland, Falcaro's

business associate. Najjar's testimony included statements by Daoud to the effect that he was going to see an attorney about some car thieves. Roland reported that Falcaro had expressed incredulity at the fact that his competitor, Ustica, seemed to obtain cars without apparent effort. These declarations, although hearsay, were clearly admissible under Fed. R. Evid. 803(3), which excepts from the prohibition of hearsay any "statement[s] of the declarant's then existing state of mind." The statements in question established the victims' existing and ongoing suspicions concerning Ustica's exportation business and were relevant to show Ustica's motive to kill them. As such, they fell squarely within the exception. *See United States v. Donley*, 878 F.2d 735, 737-38 (3d Cir. 1989) (hearsay statements by a murder victim are admissible to show motive), *cert. denied*, 110 S. Ct. 1528 (1990).

Ustica's related contention that the hearsay statements should have been excluded because they lacked the requisite additional indicia of reliability is misplaced. "[I]f a[n out-of-court] declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge . . . . " *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984); *United States v. Lawal*, 736 F.2d 5, 8 (2d Cir. 1984) ("*DiMaria* held that relevant declarations which fall within the parameters of Rule 803(3) are *categorically* admissible . . . . ") (emphasis in original). Because the out-of-court statements of Falcaro and Daoud were admissible under Fed. R. Evid. (803)(3), further indicia of their reliability was unnecessary.

CONCLUSION

The convictions of Wayne and Judith Hellman are reversed; the convictions of the other appellants, save those of Sol Hellman, *see* Note 2, *supra*, are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22th day of Jan., one thousand nine hundred and 92.

Present:
Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Circuit Judges,
Honorable Milton Pollack,
District Judge.*

UNITED STATES OF AMERICA,

Appellee,

v.

DINOME, et al.,

Defendants,

SALVATORE MANGIALINO, ANTHONY SENTER, JOSEPH TESTRA, RONALD USTICA, CARLO PROFETA, a/k/a CARLOS, a/k/a CARMELLO, DOUGLAS REGA, JUDITH MAY HELLMAN, WAYNE HELLMAN and SOL HELLMAN,

Defendants-Appellants.

ORDER

##89-1458,
89-1459,
89-1527,
89-1537,
89-1550,
89-1556,
90-1229,
90-1230,
90-1263

(Filed Jan 22, 1992)

* Of the Southern District of New York sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are affirmed, except as to Wayne and Judith Hellman, whose convictions are reversed in a published opinion, and as to the now-deceased Sol Hellman, whose convictions have been vacated.

This order disposes of numerous issues raised on appeal that have neither merit, jurisprudential significance, or precedential value. The convictions of Wayne and Judith Hellman, respectively, are reversed for reasons stated in our published opinion. The order will deal with the claims of error asserted by each appellant to the extent such claims have not been disposed of in the published opinion.

A. Joseph Testa and Anthony Senter

Testa and Senter were convicted of substantive RICO, RICO conspiracy, murder in violation of the civil rights of a federal witness, conspiracy to extend extortionate credit, conspiracy to violate various firearm statutes, conspiracy to possess and distribute narcotics, and possession of narcotics. In addition, Testa was convicted of extortion in connection with a no-show job.

Testa and Senter argue that the district court's decision to admit evidence pertaining to crimes, including murders, in which they were not involved was error. As noted in the published opinion, such evidence was relevant to prove both the existence and nature of the RICO enterprise and the requisite pattern of racketeering activity. The alleged error is thus based solely on the claim that the prejudicial impact of such evidence outweighed its probative weight. *See* Fed. R. Evid. 403. There was no such error.

A trial court's " 'conscientious assessment' of the Rule 40 factors will not be reversed unless there is a 'clear showing of abuse of discretion,' " *United States v. Ramirez*, 894 F.2d 565, 569 (2d Cir. 1990) (quoting *United States v. Martino*, 759 F.2d 998, 1005 (2d Cir. 1985)), and it can be demonstrated that the trial court acted "arbitrarily or irrationally." *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978).

Testa's and Senter's claim is totally meritless. In light of the evidence that Testa and Senter were involved in numerous murders, all of which furthered the goals of the DeMeo Crew, we cannot conclude that the district court's admission of evidence of other murders that were probative of the nature of the RICO enterprise and appellants' pattern of racketeering activity was so prejudicial as to constitute abuse of discretion or an arbitrary or irrational act.

B. Ronald Ustica

Ustica was convicted of a substantive RICO violation and RICO conspiracy.

Ustica also claims that the evidence of the DeMeo Crew's crimes was so prejudicial as to require reversal. We again disagree. Given the overwhelming evidence of Ustica's solicitation of Falcaro's and Daoud's murders and his participation in luring them to their deaths, we see no prejudice that could have affected his conviction, much less outweighed the probative value of the evidence in question.

Ustica's convictions at the first, severed trial were introduced against him as evidence of predicate racketeering acts. Ustica argues that the government intentionally suppressed evidence that a witness against him at the first trial had committed an undisclosed robbery. This suppression, he claims, eliminated Ustica's opportunity to impeach the witness at the first trial, thus tainting his convictions. So tainted, he argues, the convictions were inadmissible in the instant matter.

Ustica's claim lacks plausibility. The jury at the first trial already had before it evidence that the witness had committed three robberies. Evidence of a fourth robbery would, therefore, have added little to the attack on the witness's credibility. *See United States v. Page*, 808 F.2d 723, 730 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987). Additionally, the evidence of the witness was not critical to the conviction. Indeed, Ustica's counsel declined even to cross-examine the witness at the first trial. Ustica thus cannot claim that there exists a "reasonable probability that, had the evidence [relating to the witnesses' undisclosed, fourth robbery] been disclosed to the defense, the result of [Ustica's prior trial] would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *see also id.* at 685 (White, J., concurring in

part and concurring in the judgment, but specifically approving the quoted formulation); *United States v. Petrillo*, 821 F.2d 85, 89-90 (2d Cir. 1987) (finding that there was not a significant chance that the withheld item of evidence, if developed by skilled counsel, "could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction") (citation omitted).

C. Douglas Rega

Rega was convicted on substantive RICO and RICO conspiracy charges and charges of mail fraud, extortion, and conspiracy to commit certain firearms offenses.

Rega's objection to the evidence of the DeMeo Crew's use of violence as a means of furthering its goals is meritless. That very *modus operandi* led him to seek the Crew's assistance when he wanted his uncle, Fred Todaro, murdered. Moreover, knowing of the nature of the enterprise, Rega engaged in arms trafficking with it.

Rega also argues that there was insufficient evidence to establish that he violated the Hobbs Act by extorting his uncle's film business and the building from which it was operated. His principal contention is that the building was not actually owned by his uncle. He also argues that there was insufficient proof of threats of violence or fear in his effort to obtain the property from Todaro and that additionally, there was insufficient evidence of an effect on interstate commerce.

Rega's contentions are meritless. An appellant challenging the sufficiency of evidence supporting a conviction carries "a very heavy burden." *United States v.*

Scarpa, 913 F.2d 993, 1003 (2d Cir. 1990) (citation omitted). Rega has failed to carry that burden. With regard to the ownership issues, there was evidence that the transfer of the building from Todaro's control to Rega's mother was a temporary expedient that was part of a larger plan to insulate the property from a divorce settlement, after which Todaro would recover control of the building.

There was also ample evidence that Rega had employed threats to instill fear in Todaro. Not only had Rega issued threats to Todaro but he also participated in an effort to kidnap Todaro because of Todaro's pending court action against Rega. Finally, because Rega obtained title to a building containing other tenants engaged in interstate commerce and because the film business itself was capable of revival, Rega's extortion possessed the necessary element of an effect on interstate commerce. *See United States v. Augello*, 451 F.2d 1167, 1169-70 (2d Cir. 1971) (holding that the requirement of an effect on interstate commerce was satisfied even when the effect shown is "merely potential or subtle"), *cert. denied*, 405 U.S. 1070 (1972).

Rega argues that the district court's refusal to admit hearsay testimony concerning a conversation between his uncle and an attorney who had represented Todaro and a letter from that attorney to Todaro was error. The substance of the conversation and letter allegedly established that Todaro had transferred all his stock in the corporation owning the disputed building to Rega. This supported Rega's claim that the building was his at all relevant times and that there was nothing for him to extort.

Rega sought to introduce this hearsay testimony under Fed. R. Evid 804(b)(3) as a declaration against interest. However, Judge Broderick found that Todaro was not unavailable within the meaning of Rule 804(a) because Rega had procured Todaro's absence "for the purpose of preventing [Todaro] from . . . testifying." The finding that Rega had Todaro murdered in order, *inter alia*, to silence him is not clearly erroneous. Moreover, there was evidence that Todaro had both transferred stock in the corporation to Rega's mother and intended that Rega serve as its president as a temporary measure until Todaro's divorce proceeding was settled. That evidence thoroughly undermines Rega's contention that the conversation and letter in question were against Todaro's pecuniary interests.

Because the hearsay evidence proffered by Rega related to a past act, the transfer of stock, it was also not admissible as a declaration of an "existing state of mind" under Section 803(3). Moreover, Judge Broderick admitted a number of hearsay statements by Todaro indicating that Rega would be taking over the corporation, and thus the exclusion of the testimony in question was harmless, even if error.

Rega argues that there was insufficient evidence to support his conviction on mail fraud charges because the attorney who directed the litigation aimed at extinguishing his then-dead uncle's claim to the disputed property was acting on his own, without instructions from Rega. Accordingly, he claims that the mail fraud statute's requirement of "scheme to defraud" was unproved. However, there was considerable evidence to the contrary. The attorney who terminated Todaro's action against Rega

had indicated that he had been instructed to do so by his client. Given Todaro's disappearance prior to the time this statement was made, the jury might well have inferred that the client was Rega himself. Rega clearly stood to benefit from the litigation and was the client who had been present at settlement negotiations. Moreover, the power-of-attorney on which Rega relies as the source of the attorney's supposed authority to act independently was invalid at the time of pertinent events.

Rega's codefendant Fred DiNome pleaded guilty in the instant case and provided testimony before a grand jury and at his own plea allocution implicating Rega in the murder of his uncle, Fred Todaro. DiNome committed suicide before the commencement of the second trial and was thus unavailable within the meaning of Fed. R. Evid. 804(a)(4). Rega argues that the district court's admission of various portions of DiNome's prior testimony at the second trial was error because these statements did not satisfy any of the hearsay exceptions and their admission denied Rega his Sixth Amendment confrontation right.

However, the hearsay statements in question were admissible under Section 804(b)(3) as statements against penal interest. *See United States v. Garris*, 616 F.2d 626, 630 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); *United States v. Casamento*, 887 F.2d 1141, 1171 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). In *Casamento*, we held that the district court is not required to excise portions of statements against penal interest that refer to other defendants where the reference to the other is clearly connected to the content of the declarant's own inculpatory statements. That is the case here, where the challenged statements mentioning Rega are part of a colloquy discussing

DiNome's own participation in a murder. The reference to Rega's payment of $10,000, corroborated by Rega in a post-arrest statement, explained DiNome's motive in helping to dispose of the body of Fred Todaro.

Rega further contends that the admission of DiNome's hearsay statements violated his Sixth Amendment right to confront witnesses against him. The Confrontation Clause may bar the admission of evidence that is otherwise admissible under a hearsay exception. *California v. Green*, 399 U.S. 149, 155-56 (1970). When the declarant is, as here, demonstrably unavailable, a prior hearsay statement is admissible under the Confrontation Clause only if it bears adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). But, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay objection." *Id.* at 66; *Idaho v. Wright*, 110 S. Ct. 3139, 3146 (1990) (same); *see also Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987) (statements satisfying the coconspirator hearsay exception do not violate the Confrontation Clause). Because the penal interest exception, Fed. R. Evid. 804(b)(3) is a "firmly rooted" one, *Roberts*, 448 U.S. at 66, and the essence of DiNome's testimony was corroborated by other evidence, including Rega's own post-arrest statements, admission of that testimony did not violate Rega's Sixth Amendment rights.

Rega also contends that the district court erred in admitting, as declarations by a coconspirator in furtherance of the conspiracy under Fed. R. Evid. 801(d)(2)(E), testimony by DeMeo Crew member Vito Arena. Arena testified that, when Fred DiNome was seeking to recruit Arena for the DeMeo Crew, DiNome stated

that Rega had instigated the murder of Fred Todaro. DiNome also described the Crew as willing to resort to murder to achieve its ends. Rega argues that the hearsay declarations were inadmissible because Rega was not a member of the auto theft conspiracy and the declarations were not admissible against him in connection with his involvement in the Todaro murder. Rega's argument mistakenly limits the relevant conspiracy to the auto theft conspiracy. However, Dinome, Arena and Rega were RICO coconspirators, as well. Because Dinome's hearsay declarations both furthered the inducement of Arena into the enterprise, *see United States v. Herrero*, 893 F.2d 1512, 1527-28 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990), and apprised him of other activities of the DeMeo Crew, *see United States v. Rastelli*, 870 F.2d 822, 837 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989), the district court correctly admitted the statements.

Rega also argues that the district court abused its discretion in admitting evidence of Rega's conviction on obscenity charges and involvement in the distribution of child pornography. However, there was no testimony concerning a *conviction* on obscenity charges. Instead, the district court admitted testimony that criminal charges involving pornography were pending against Rega at the time of Todaro's murder for the limited purpose of showing that the existence of the pending charges was a reason for Rega to ask DeMeo to eliminate Todaro, a potential informant against Rega. The evidence of Rega's involvement in the distribution of child pornography was directly probative of a link between Rega and the DeMeo Crew. Rega's involvement with the Crew in the pornography trade was thus directly relevant to the existence and

nature of the RICO conspiracy as well as to Rega's motive in instigating the murder of Todaro. Given the clear probative value of this evidence, there was no abuse of discretion in its admission.

Rega argues that the representation afforded him by his first court-appointed attorney, who represented him after his original retained attorney became ill, was so ineffective as to violate his Sixth Amendment rights. Claims alleging ineffective assistance of counsel are generally to be presented first to the district court in order that a complete evidentiary record can be developed. *United States v. Aulet*, 618 F.2d 182, 185 (2d Cir. 1980). However, where "the proper resolution is beyond any doubt," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), we have considered claims of ineffective assistance of counsel for the first time on appeal. *See, e.g., United States v. Cruz*, 785 F.2d 399, 404 (2d Cir. 1986). We do so here.

To establish the ineffectiveness of counsel, Rega must show both that the assistance provided him "was unreasonable under the 'prevailing professional norms,' " *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)), and that, but for the incompetence of counsel. there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 694.

Although the district court made no finding as to the ineffectiveness of Rega's first court-appointed attorney, we may assume his ineffectiveness. However, that attorney was effectively replaced by a second court-appointed counsel at a point in the trial when only a small portion

of completed testimony related to Rega. The new attorney had ample opportunity to prepare, and conducted a vigorous defense. Because Rega has not established the existence of a reasonable probability that, but for the representation provided him by his first counsel, the outcome of proceedings would have been different, his ineffective assistance claim must be rejected.

Rega contends that certain statements offered during the government's rebuttal summation were so prejudicial as to deny him his right to a fair trial. His arguments are meritless. In an effort to suggest the existence of a reasonable doubt as to whether Rega procured the murder of Fred Todaro, defense counsel stated on summation that there was as much evidence against Rega's brother, Jerry Caminito, as there was against Rega himself. The government's statement in rebuttal that, if such evidence indeed existed, it could have been brought out – Caminito had testified – was an entirely legitimate effort to point out the absence of any factual foundation for the comparison. The government's observation on rebuttal that Eleanor Caminito could also have taken the stand was a similarly legitimate effort to rebut a comparably unsupported defense argument. Finally, Rega's argument that the government's remarks at summation concerning Governing Exhibit 600 were improper and unfairly prejudicial was not raised as an objection at trial and is therefore waived.

D. Salvatore Mangialino

Appellant Mangialino was convicted of substantive RICO, RICO conspiracy and conspiracy involving firearms.

Mangialino contends that his RICO convictions must be overturned because the racketeering acts supporting the convictions do not constitute a pattern because they lack the requisite relatedness and continuity. We disagree. The racketeering acts charged included the bribery, and subsequent murder, of Charles Mongitore. Because both acts showed " 'the same or similar . . . purpose[,] participants [and] victims,' " *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2901 (1989) (quoting 18 U.S.C. § 3575(e), they are sufficient to satisfy the relatedness aspect of the RICO pattern requirement.

There is evidence to satisfy the continuity requirement as well. "[T]he threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 2902. Mangialino's employment of the DeMeo Crew to murder Mongitore, and thereby eliminate him as a witness in a stabbing committed by Mangialino's son, was part of what the evidence showed to be a long-time association existing for criminal purposes.

Mangialino contends that the government failed as a matter of law to establish the existence of a single firearms-related conspiracy for which he was convicted. We disagree. Where a conspiracy has several areas of operation, there is still but one conspiracy if the spheres assist and cooperate with one another, *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 432 U.S. 909, *and* 434 U.S. 853 (1977), and the coconspirators participated in the conspiracy "conscious[] of its general nature and intent." *United States v. Alessi*, 638 F.2d 466, 473 (2d Cir. 1980). There was abundant evidence from which the jury

could have found a single conspiracy to use firearms to commit federal felonies and Mangialino's participation in that conspiracy.

Mangialino also challenges Judge Broderick's admission of a number of surveillance photographs of him with members and associates of the Gambino crime family, arguing that their probative value was outweighed by their unfairly prejudicial effect. The photographs in question included some of Mangialino with Roy DeMeo and others of Mangialino with members of the Gambino family.

The photographs with DeMeo were clearly probative of Mangialino's association with the DeMeo Crew, a relationship that his sufficiency argument impliedly denies. To the extent the other photographs were probative of Mangialino's relationship to the DeMeo Crew, a relationship supporting the "favor" done him by the killing of Mongitore, they too were relevant and probative. Although the photographs may not have been entirely lacking in prejudicial effect, we can hardly say that Judge Broderick's decision to admit them was a clear abuse of discretion. *United States v. Simmons*, 923 F.2d 934, 948 (2d Cir.), *cert. denied*, 111 S. Ct. 2018 *and* 112 S. Ct. 383 (1991).

E. Carlo Profeta

Appellant Profeta seeks reversal of his convictions for violations of RICO, RICO conspiracy, conspiracy to make extortionate extensions of credit, and conspiracy to collect extensions of credit by extortionate means.

There was evidence that Profeta was a member of the DeMeo Crew and a person who frequented the Gemini clubhouse – the hub of much of the Crew's criminal activity. There was also testimony that Profeta participated in the division of loansharking profits and that he had established his loansharking business through a $30,000 "book" provided him by Roy DeMeo. There was further testimony that Profeta accompanied both DeMeo and DiNome when they collected loansharking monies. Additionally, there was evidence of Profeta's involvement in four specific loans in the form of testimony offered by persons from whom Profeta had collected payments.

That evidence established that Profeta had directly threatened one of the borrowers, Frank Foronjy, in connection with a loan made him by Roy DeMeo. The government concedes that in the case of two of these loans, to witnesses Mione and Edwards, there was insufficient evidence to establish that, viewed in isolation, the loans were extortionate. Profeta claims that the admission of evidence concerning those loans was error. However, in light of the abundant evidence concerning Profeta's involvement in the loansharking activities of the DeMeo Crew, including participation in the division of loansharking profits and accompanying members of the Crew in collection efforts, and the meager prejudicial effect, if any, of the evidence regarding non-extortionate loans, we cannot conclude that Judge Broderick's decision was a clear abuse of discretion, *United States v. Martino*, 759 F.2d 998, 1005 (2d Cir. 1985), or that he acted "arbitrarily or irrationally." *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978).

Profeta's related contention that the evidence supporting the RICO convictions was insufficient also lacks merit. This claim falls in the face of evidence that Profeta gathered with other members of the DeMeo racketeering enterprise to divide loansharking proceeds and that Profeta accompanied other members of the enterprise in the course of collecting the loans.

Profeta objects to evidence of money orders sent by Profeta to DiNome in March 1984. He argues that the receipt of the money orders was so long after the concluding date of the charged conspiracy, February 1983, as to be irrelevant. We disagree. Post-conspiracy conduct may be evidence of participation in a conspiracy. The money orders in question thus tended to prove the existence of an ongoing relationship between Profeta and the DeMeo Crew and were sufficiently probative of the existence of the relationship in 1983 as to be admissible.

Profeta argues that the district court erred in allowing the government to read into the trial record certain prior testimony before a grand jury by Frank Foronjy under Fed. R. Evid. 801(d)(1)(A). Profeta claims that, because the government was not surprised at the content of Foronjy's testimony at trial, it was foreclosed from introducing the prior statements. However, Rule 801(d)(l)(A) does not require that a party be surprised by the trial testimony of a witness. *See United States v. Jordano*, 521 F.2d 695, 697 (2d Cir. 1975). Because the grand jury evidence was given under oath and Foronjy was a witness at trial subject to cross-examination, his grand jury testimony was plainly admissible under Rule 801(d)(1)(A).

Profeta's contention that the government engaged in serious misconduct in making remarks allegedly shifting the burden of proof is frivolous.

G. Conclusion

We have examined other claims of error by appellants and have concluded that they are too meritless to require discussion. The judgments of conviction as to all appellants except Wayne, Judith and Sol Hellman are affirmed.

/s/ Hon. Ralph K. Winter, U.S.C.J.

/s/ Hon. Frank X. Altimari, U.S.C.J.

/s/ Hon. Milton Pollack, U.S.D.J.

UNITED STATES of America, Appellee,

v.

Ronald USTICA, Joseph Testa, and Anthony Senter, Defendants-Appellants.

Nos. 830-832, Dockets 88-1003 to 88-1005.

United States Court of Appeals, Second Circuit.

Argued Feb. 11, 1988.

Decided Feb. 16, 1988.

Opinion May 16, 1988.

Walter S. Mack, Jr., Asst. U.S. Atty., S.D.N.Y. (Aaron R. Marcu, Asst. U.S. Atty., Rudolph W. Giuliani, U.S. Atty., S.D. N.Y., of counsel), for appellee.

Judd Burstein, New York City (Lee Ginsberg, Freeman, Nooter & Ginsberg, New York City, of counsel), for defendant-appellant Ustica.

Diarmuid White, New York City (Lipsitz, Green, Fahringer, Roll, Schuller & James, New York City Harold Price Fahringer and Benjamin Brafman, New York City, of counsel), for defendants-appelants Testa and Senter.

Before LUMBARD and CARDAMONE, Circuit Judges, and LEISURE, District Judge*.

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* Hon. Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

LEISURE, District Judge:

This is consolidated appeal, by three criminal defendants, from an order, by the United States District Court for the Southern District of New York, granting the government's motion to allow retrial of the defendants on a charge of violating 18 U.S.C. § 241.[1]

The three defendants – Ronald Ustica, Joseph Testa, and Anthony Senter – were originally tried on a multi-count indictment charging several federal crimes. The jury found Ustica guilty of violating § 241; the jury also convicted Ustica of violations of 18 U.S.C. § 2314 and 18 U.S.C. § 371.[2] Testa and Senter were acquitted of violating both § 2314 and § 371, but the jury could reach no verdict as to whether Testa and Senter had violated § 241. Thus, as to Testa and Senter, the district court declared a mistrial on Count Four of the indictment, which charged the defendants with violations of § 241.

Ustica appealed from his conviction. On January 21, 1987, this Court held that the evidence presented a trial was, as a matter of law, insufficient to support defendant Ustica's conviction on the § 241 count. *United States v.*

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[1] 18 U.S.C. § 241 makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . . "

[2] 18 U.S.C. § 2314 proscribes the transportation of stolen property in interstate and foreign commerce. 18 U.S.C. § 371, the federal conspiracy statute, makes it illegal to conspire to commit, as charged in this case, the substantive crime of transporting such stolen property.

Gaggi, 811 F.2d 47, 58 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3214, 96 L.Ed.2d 701 (1987). Ustica's other convictions, for violations of § 2314 and § 371, were affirmed. *Id.* at 63.

Because Ustica's conviction on the § 241 count was set aside on the ground of insufficient evidence, we hold that a new trial on that count would subject him to double jeopardy in violation of the fifth amendment of the Constitution. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). However, because Testa's and Senter's first exposure to jeopardy on the § 241 count did not terminate when the original trial court declared a mistrial, we hold that Testa and Senter have no valid double jeopardy claim to prevent retrial on that count of the indictment. *See Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

After hearing argument on February 11, 1988, this Court filed an Order on February 16, 1988, reversing the district court's order with respect to Ustica, and affirming the order with respect to Testa and Senter, noting that this opinion would follow.

FACTUAL BACKGROUND[3]

On October 4, 1984, the government filed a 78-count indictment naming twenty-four defendants, including the

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[3] Much of the factual background of this case has been discussed in *United States v. Gaggi*, 811 F.2d at 49-53. We discuss here only those facts relevant to the issues presently on appeal.

appellants, and alleging eleven different conspiracies.[4] Among the various alleged acts covered by the indictment were twenty-seven murders, illegal narcotics transactions, extortionate credit transactions, the interstate transportation of stolen automobiles, and bribery of a juror. All twenty-four defendants were charged with participation in a racketeering enterprise in violation of 18 U.S.C. § 1962. The case was assigned to United States District Judge Kevin Thomas Duffy.

On September 9, 1985, Judge Duffy severed, for separate trial, twenty-three counts of the indictment, which charged ten of the defendants, including appellants, with crimes related to a stolen car business.[5] That trial, which is of concern to this appeal, began on September 30, 1985, and lasted until March 5, 1986.[6] Five of the defendants, including Ustica, were convicted of conspiring to transport stolen property in violation of 18 U.S.C. § 371; Testa

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[4] The indictment filed on October 4, 1984, superseded the original indictment filed on January 30, 1984, and two superseding indictments filed on March 29, 1984, and September 14, 1984.

[5] Along with Ustica, Testa, and Senter, the other defendants tried for participation in the stolen car ring were Paul Castellano, Anthony Gaggi, Henry Borelli, Peter La Froscia, Ronald Turekian, Edward Rendini, and Richard Mastrangelo. Castellano was murdered during the trial. Mastrangelo was acquitted by the Court at the close of the government's case.

[6] For that trial on the severed charges, the indictment of October 4, 1984, was redacted to include only the severed charges, and the counts were accordingly renumbered. The charges under 18 U.S.C. § 241, against Ustica, Testa, and Senter, which were contained in Count Four of the indictment filed on October 4, 1984, were contained in Count Twenty-Three of the redacted indictment.

and Senter were acquitted of that charge. Three of the defendants, including Ustica, were convicted of various counts charging interstate or foreign transportation of stolen property, in violation of 18 U.S.C. § 2314; Testa and Senter were acquitted of the counts in which they were named. On the § 241 count that is the subject of this appeal, Ustica and one other defendant were convicted of a conspiracy to deny the civil rights of two murder victims; the jury was unable to reach a verdict on this court as to Testa and Senter.[7]

Relevant to this appeal are certain trial proceedings relating to the § 241 count. It was the government's case that the defendants conspired to murder Ronald Falcaro and Kalid Fahd Darwish Daoud, two men involved in the export of cars to Kuwait. Ustica wanted Falcaro and Daoud killed after he saw them copying vehicle identification numbers of the defendants' stolen cars. As previously stated, the jury was unable to reach a verdict, as to Testa and Senter, on this count. The government endeavored to show that Ustica and his cohorts feared that Falcaro and Daoud were gathering information which would expose defendants' stolen car scheme to law enforcement authorities; that on October 12, 1979, one of the defendants, Henry Borelli, and an unindicted coconspirator, Roy DeMeo, shot and killed Falcaro and Daoud; that Testa and Senter participated in the dismemberment of the victims' bodies with boning knives and

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[7] At trial, defendant Ronald Turekian was also convicted on four mail fraud counts related to his participation in the stolen car ring. 18 U.S.C. § 1341 makes it a federal crime to commit mail fraud.

saws; and that the victims' body parts were wrapped in garbage bags and hauled away by Senter in a private sanitation truck.

On Thursday, January 30, 1986 – *prior* to the close of the government's case, but after the government had presented its evidence on the § 241 violation – the defendants moved, pursuant to Fed.R.Crim.P. 29, for judgments of acquittal on the § 241 count. Although the government had not completed its direct case, the defense's Rule 29 motion relating to § 241 was argued, by agreement of counsel and the trial court, as if the prosecution had rested. The defendants claimed that the government had failed to prove the American citizenship of the victims, which the defendants argued was an essential element of a violation of § 241. Section 241 makes it a crime to conspire "to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," 18 U.S.C. § 241 (emphasis added). Judge Duffy denied defendants' Rule 29 motion, ruling that § 241 protects not just the civil rights of American citizens, but of "all those people who would be protected by the constitutional requirements of due process" – including non-resident aliens. At that time, however, Judge Duffy also indicated that he intended "to give the jury a special question in connection with [the issue of citizenship]."

Prior to defendants' Rule 29 motion, the government had testimony, by victim Falcaro's wife, which made reference to Falcaro's residence status at the time of the murders. Specifically, Falcaro's wife testified that at the time of his death, her husband resided in Nassau County,

was licensed by New York State as an automobile dealer, and paid both state and federal taxes. However, when defendants made their Rule 29 motion, prior to the actual close of the government's case, the government did not seek to introduce any additional evidence going to the citizenship of the victims.[8]

Following Judge Duffy's holding on the Rule 29 motion, the government continued, and concluded, its case on the next trial day: Monday, February 3, 1986. The defense presented a short case, and rested, on Tuesday, February 4. Later the same day, after both the government and the defendants had already rested their cases, the government moved to reopen its direct case for the sole purpose of introducing into evidence the American birth certificate of victim Falcaro. The government's application was denied by the court.

As Judge Duffy had indicated earlier, he did instruct the jury to consider specially the issue of the victims' citizenship.[9] The jury found that victim Falcaro was an American citizen.

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[8] During oral argument of this appeal, government counsel stated that the American birth certificate of victim Falcaro was pre-marked as an exhibit and available to be introduced into evidence, but was not proffered at that time, apparently because of inadvertence or mistake. *See* discussion, *infra*, at Note 12.

[9] Judge Duffy instructed the jury that:

> "[w]e have not had in this record any evidence, any birth certificate or naturalization papers for either Falcaro or Daoud. As to Falcaro, you can, but you

(Continued on following page)

When Ustica appealed his conviction, however, this Court determined that "[t]he evidence as to both victims fails to satisfy the government's burden of proof [on the § 241 count]." *United States v. Gaggi*, 811 F.2d at 58. After determining that an essential element of a violation of § 241 is the American citizenship of the victim, *id.* at 53-58, this Court explained that "Daoud is a Jordanian citizen, not an American citizen. The jury found that Falcaro was a United States citizen, but on the evidence presented, no rational jury could have found Falcaro to be a citizen beyond a reasonable doubt." *Id.* at 58.

Following this Court's decision in *Gaggi*, Judge Duffy recused himself from further involvement in the case, and the case was reassigned to Judge Vincent L. Broderick.

(Continued from previous page)

don't have to, infer his citizenship from other evidence in the case.

* * *

In considering this count, I want you to be aware of the fact that Daoud was in possession, according to the testimony, Daoud was in possession of a Jordanian passport at the time he was killed. From that you could conclude that Daoud was Jordanian and not a United States citizen.

This is an area of the law, ladies and gentlemen, which is far from being clear. With that in mind, I am asking you to answer a specific question. First of all, I want you to consider Falcaro and Daoud separately. Secondly, I want you to answer a special question. The special question is: Was Ronald Falcaro a citizen of the United States?

On June 2, 1987, the government moved, before Judge Broderick, for an order permitting retrial of Ustica, Testa, and Senter on the § 241 count of the indictment; the defendants moved to bar retrial. On December 30, 1987, Judge Broderick granted the government's motion as to all three defendants.

DISCUSSION

A. *Defendant Ustica*

The fifth amendment of the Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."

It has long been established that the Double Jeopardy Clause generally will not bar reprosecution where a convicted defendant has managed, through an appeal, to set aside his conviction. *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). However, there is one clear exception to this rule: where a conviction is set aside on appeal on the ground of insufficiency of the evidence, a new trial will subject the defendant to double jeopardy, and thus such retrial is barred. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *see also Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

This exception to the double jeopardy rule is based on the premise that in the context of double jeopardy, an appellate reversal for evidentiary insufficiency is no different from a trial court acquittal on grounds that the evidence will not support a conviction. Rule 29 of the

Federal Rules of Criminal Procedure provides that a district court "shall order the entry of [a] judgment of acquittal" if it determines that the evidence is insufficient. Fed.R.Crim.P. 29. When such a judgment of acquittal is entered by the district court, a defendant may not be retried for the same offense. *See Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904). In *Burks*, Chief Justice Burger, writing for a unanimous Court,[10] explained that just as a defendant cannot be retired for the same offense when a district court determines that the evidence presented at trial requires a judgment of acquittal, "it should make no difference [for double jeopardy purposes] that the *reviewing* court, rather than the trial court, determine[s] the evidence to be insufficient." *Burks*, 437 U.S. at 11, 98 S.Ct. at 2147 (emphasis in original). Justice O'Connor has similarly written for the Court that "[a] verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal [by an appellate court] based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida*, 457 U.S. at 41, 102 S.Ct. at 2217.

That a defendant may not be retried following an acquittal or a reversal for insufficient evidence is "explainable by reference to the underlying purposes of the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. at 91, 98 S.Ct. at 2194. *See also Tibbs*, 457 U.S. at 41,

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[10] Justice Blackmun took no part in the decision in that case.

102 S.Ct. at 2217. The Double Jeopardy Clause "attaches particular significance to an acquittal," and "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' " *Scott*, 437 U.S. at 91, 98 S.Ct. at 2194 (citation omitted). *See also Tibbs*, 457 U.S. at 41, 102 S.Ct. at 2217; *United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980).

Moreover, the public has no interest in the retrial of a defendant whose conviction has been reversed based on insufficiency of the evidence. Because a jury's *verdict* of acquittal is treated as being absolutely final and bars retrial, "it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." *Burks*, 437 U.S. at 16, 98 S.Ct. at 2150. Thus, as then Justice Rehnquist wrote for the Court, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates that prosecution when a second trial would be necessitated by a reversal." *Scott*, 437 U.S. at 91, 98 S.Ct. at 2194.

Neither party disputes that in *United States v. Gaggi*, *supra*, this Court reversed defendant Ustica's conviction on grounds of insufficient evidence.[11] This Court

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[11] *Cf. Tibbs v. Florida*, 457 U.S. 31, 44-47, 102 S.Ct. 2211, 2219-21, 72 L.Ed.2d 652 (1982) (noting a distinction between

(Continued on following page)

determined that "on the evidence presented, no rational jury could have found Falcaro to be a citizen beyond a reasonable doubt," and that therefore the evidence "was insufficient as a matter of law to support the conviction [of Ustica] under § 241." 811 F.2d at 58.

The government argues, however, that retrial of Ustica should nonetheless be permitted because the evidence was insufficient only as a result of an "error" by the trial court.[12] Rejecting this argument, Judge Broderick

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appellate reversals based on weight of the evidence and appellate reversals based on insufficiency of the evidence, the Court explained that "[w]e have no reason to believe that today's decision will erode the demonstrated ability of judges to distinguish legally insufficient evidence from evidence that rationally supports a verdict.").

[12] The government does not contend that Judge Duffy's actual decision, prohibiting the government from introducing Falcaro's birth certificate into evidence *after both the prosecution and the defense had rested*, should be considered "erroneous." The government's appeal brief explicitly states that it "does not assign [Judge Duffy's decision to deny the government's motion to reopen its case, after both sides had rested, for the purpose of introducing the birth certificate] as the error that necessitated a new trial for Ustica." The government does claim, however, that the "error" below was "Judge Duffy's erroneous interpretation of § 241 to cover lawfully present aliens [rather than only citizens]." According to the government, "[i]t was that error that led to the reversal in this case and, not insignificantly, that plainly prompted Judge Duffy to reject the Government's only slightly belated offer of the Falcaro birth certificate."

At trial, the government was warned by the court on Thursday, January 30, 1986 – four days

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found below that "[d]efendant Ustica is correct that Judge Duffy's ruling excluding Mr. Falcaro's birth certificate cannot be considered erroneous." But this Court need not determine whether Judge Duffy did indeed commit trial error, because appellate reversal, based on insufficient evidence, bars retrial even if some trial error caused the evidentiary insufficiency.

In our opinion, the issue of trial error is irrelevant to double jeopardy analysis where a defendant's conviction has been reversed on appeal because of insufficient evidence. Where a trial court grants a defendant's motion for

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prior to the actual close of the government's case – that a special verdict would be submitted to the jury on the issue of citizenship. *See* discussion, *supra*, at p. 44. Government counsel stated at oral argument before this Court that it was the government itself that failed to offer the birth certificate into evidence in a timely fashion, and that it was a failure of communication between government trial counsel that caused the government not to seek to introduce the birth certificate when defendants made their Rule 29 motion. The government also stated that it never asked victim Falcaro's widow, a witness at the trial, whether her husband was a citizen, because the government had intended to introduce the birth certificate into evidence during the presentation of its case – something that was not accomplished because of inadvertence or mistake. With laudable candor, government counsel acknowledged during oral argument of this appeal that the government's handling of the birth certificate at trial was a major mistake.

acquittal, or where an appellate court reverses a conviction because of insufficient evidence, it makes no difference whether any failure of proof is the fault of the government or the result of an erroneous ruling by the trial court. In *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), decided the same day as *Burks*, the trial court had made what "is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence." *Sanabria*, 437 U.S. at 68-69, 98 S.Ct. at 2180-81. Yet the Supreme Court concluded "[t]hat judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." *Id.* Similarly, in *United States v. Scott*, the Court concluded that the Double Jeopardy Clause does not allow a second trial after an acquittal based on the insufficiency of the evidence, "however mistaken the acquittal may have been." *Scott*, 437 U.S. at 91, 98 S.Ct. at 2194. Consistent with this analysis, the Court in *Burks* distinguished appellate reversals based on insufficient evidence, where retrial is never permitted, from reversals involving trial court error, where retrial may be permitted in certain circumstances. *Burks*, 437 U.S. at 14-16, 98 S.Ct. at 2148-50.[13]

As we observed above, to permit a second trial following a reversal for insufficient evidence "would

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[13] The *Burks* Court drew such a distinction despite noting that "[t]here is no claim in this case that the trial court committed error by excluding prosecution evidence which, if received, would have rebutted any claim of evidentiary insufficiency." *Burks*, 437 U.S. at 5 n. 4, 98 S.Ct. at 2144 n. 4.

present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' " *Scott*, 437 U.S. at 91, 98 S.Ct. at 2194 (citation omitted) (discussing the risks associated with retrial following an acquittal for insufficient evidence). This high risk exists whether or not error by the trial court caused the evidentiary insufficiency. The effect on the defendant is the same. The defendant must again undergo the trauma and difficulties of trial and jury verdict – in short, he must suffer double jeopardy.

We therefore hold that any retrial of Ustica on the § 241 count would subject him to double jeopardy, in violation of the fifth amendment of the Constitution. We are well aware that the jury found that Ustica played a role in heinous and barbarous murders, but we are also aware that "where the Double Jeopardy Clause is applicable . . . [t]here are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n. 6, 98 S.Ct. at 2147 n. 6.

B. *Defendants Testa and Senter*

Although Ustica was convicted on the § 241 count of the indictment, the jury could reach no verdict with respect to whether Testa and Senter had violated § 241. The trial court therefore declared a mistrial, as to Testa and Senter, on the § 241 count.

It has long been established that where a mistrial is declared because of the failure of a jury to reach a verdict,

there is no double jeopardy bar to retrial of the defendant. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 579-80, 6 L.Ed. 165 (1824). *See also Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978); *Logan v. United States*, 144 U.S. 263, 297-98, 12 S.Ct. 617, 627-28, 36 L.Ed. 429 (1892). In *Perez*, the Supreme Court explained that the Double Jeopardy Clause does not bar such retrial because a declaration of a mistrial, after a hung jury, is a "manifest necessity" to secure "the ends of public justice." *Perez*, 22 U.S. (9 Wheat.) at 579-80.

In light of this well established principle, the Supreme Court has determined that where there has been a mistrial because of a hung jury, the Double Jeopardy Clause does not bar retrial – regardless of any evidentiary insufficiency at the first trial. *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984). In *Richardson*, the Court explained that unlike an appellate reversal on insufficiency grounds, a mistrial because of a hung jury is not an "event" that terminates the original jeopardy to which the defendant was subject. Therefore, following such a mistrial, even if an appellate court could determine that the prosecution's evidence was insufficient to support a conviction, a defendant nonetheless has no valid double jeopardy claim:

> Since jeopardy attached here when the jury was sworn, petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy. . . . [W]e hold . . . that the failure of the jury to reach a verdict is not an event which terminates jeopardy.

* * *

> The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. *Regardless of the sufficiency of the evidence at petitioner's first trial,* he has no valid double jeopardy claim to prevent his retrial.

Id. at 325-26, 104 S.Ct. at 3086-87 (citations omitted) (emphasis added). Thus, "[w]here . . . there has been only a mistrial resulting from a hung jury, *Burks* simply does not require that an appellate court rule on the sufficiency of the evidence. . . . " *Id.* at 323, 104 S.Ct. at 3085. Indeed, as the Court stated, "[i]t follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer 'colorable' double jeopardy claims which may be appealed before final judgment." *Id.* at 326 n. 6, 104 S.Ct. at 3086 n. 6.

Testa and Senter argue, however, that the present case should be distinguished from *Richardson.* They claim that while in *Richardson* no "event" had occurred to terminate the original jeopardy, in the present case such an "event" did occur – namely, the finding by this Court, in *Gaggi,* that the evidence at trial was insufficient to convict defendant Ustica on the § 241 count. In essence, Testa and Senter claim that although a mistrial was declared as to them on the § 241 count, this Court's holding on the insufficiency of the evidence as to a convicted co-defendant – namely Ustica – should be applied to them to bar retrial.

Richardson makes clear, however, that "[r]egardless of the sufficiency of the evidence at [the] first trial, [a defendant] has no valid double jeopardy claim to prevent his retrial [following a mistrial for a hung jury]," *Richardson*, 468 U.S. at 326, 104 S.Ct. at 3086. Testa and Senter are correct that in *Richardson*, no appellate court ever actually passed on the sufficiency of any evidence at the first trial. Nor did *Richardson* address the unique circumstances of this case, where a co-defendant had his conviction reversed on grounds that evidence, which was used against all defendants at the first trial, was insufficient to prove the crime with which all the defendants were charged. But in *Richardson*, no appellate court ruled on the sufficiency of the evidence precisely because even if the evidence were to have been insufficient at the first trial, retrial would not have been barred by the Double Jeopardy Clause. Thus, we find nothing in *Richardson* to bar the retrial of Testa and Senter on the § 241 count.

Testa and Senter also argue that the doctrine of collateral estoppel bars relitigation of the issue of citizenship at their second trial. Defendants correctly point out that the doctrine of collateral estoppel applies to criminal prosecutions and may preclude the relitigation of an issue decided by a valid final judgment. *See Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *United States v. Mespoulede*, 597 F.2d 329, 332 (2d Cir. 1979). However, in *Standefer v. United States*, 447 U.S. 10, 21-25, 100 S.Ct. 1999, 2006-09, 64 L.Ed.2d 689 (1980), the Supreme Court unanimously held that, as a general

matter, nonmutual collateral estoppel[14] does not apply in criminal cases. We see no reason to apply the doctrine in this case. In light of the Supreme Court's rationale in *Richardson*, it would be inappropriate to hold that the Double Jeopardy Clause requires a nonmutual ruling on insufficient evidence to estop retrial following a hung jury. This would undermine the conclusion in *Richardson* that such retrial is not precluded regardless of any insufficiency of the evidence at the first trial. We note that Testa and Senter make no claim that either the government or the trial court encouraged a mistrial for the purpose of allowing Testa and Senter to be tried again.

It may appear incongruous that Testa and Senter can be retried on the § 241 count following a hung jury, while Ustica cannot be retried following conviction – and subsequent reversal – on that count. But "[w]hat may seem superficially to be a disparity in the rules governing a defendant's liability to be tried again is explainable by reference to the underlying purposes of the Double Jeopardy Clause." *Scott*, 437 U.S. at 91, 98 S.Ct. at 2194. Indeed, the Supreme Court reached its conclusion in *Richardson* despite the dissent's observation that "a defendant who is constitutionally entitled to an acquittal but who fails to receive one – because he happens to be tried before an irrational or lawless factfinder or because his jury cannot agree on a verdict – is worse off than a

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[14] Nonmutual collateral estoppel refers to the situation in which one party is barred from relitigating an issue decided in a previous proceeding, where the parties were not the same in the prior proceeding. In the instant case, collateral estoppel is nonmutual as to Testa and Senter because, although they were at the same trial, they were not parties to Ustica's appeal.

defendant tried before a factfinder who demands constitutionally sufficient evidence. Indeed, he is worse off than a guilty defendant who is acquitted due to mistakes of fact or law." *Richardson*, 468 U.S. at 327, 104 S.Ct. at 3087 (Brennan, J., dissenting in part) (emphasis deleted). Again we note, as we did above, that "[t]here are no 'equities' to be balanced" here, because the Double Jeopardy Clause "has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks*, 437 U.S. at 11 n. 6, 98 S.Ct. at 2147 n. 6.

CONCLUSION

The order of the district court is therefore reversed as to defendant Ustica, and Count Four of the indictment dated October 4, 1984, charging violations of 18 U.S.C. § 241, is dismissed with respect to defendant Ustica. The order of the district court is affirmed as to defendants Testa and Senter.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	SSS 84
– against –	:	CR 63 (VLB)
ANTHONY GAGGI, et al., Defendants.	:	ORDER

VINCENT L. BRODERICK, U.S.D.J.

Ronald Ustica, Anthony Senter and Joseph Testa, defendants in the above captioned case, request that this court bar the government from retrial of them on count four of the indictment which charges them with conspiracy to violate and violating § 241 of Title 18.[1] Such

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[1] 18 U.S.C. § 241 entitled "Conspiracy against rights of citizens" provides,

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . .
>
> * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

prosecution, defendants argue, is barred by the Double Jeopardy Clause of the Fifth Amendment.[2]

I.

This case was previously assigned to Judge Duffy, who conducted a trial on 23 counts of the indictment relating to the defendants' stolen car ring. In April 1986 the jury found defendant Ustica guilty on count four; the jury hung with respect to the guilt of defendants Testa and Senter on this count.

Count four of the indictment charges Joseph Testa, Anthony Senter, Ronald Ustica, Henry Borelli and Joseph Gugliemo[3] with conspiracy to violate § 241 of Title 18 United States Code, by depriving Messrs. Ronald Falcaro and Khaled Fahd Darwish Daoud of their civil rights to be witnesses against said defendants and that the deaths of Messrs. Falcaro and Daoud resulted from this conspiracy.[4]

At the close of the government's case in the trial before Judge Duffy, the defendants moved under Rule 29,

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[2] The Double Jeopardy Clause reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

[3] The government has made no application to retry Mr. Borelli. Mr. Gugliemo was a fugitive and was not present at the trial before Judge Duffy.

[4] The same defendants are charged, *inter alia*, in counts one and two of the Indictment, the RICO counts. Acts of racketeering numbers 21 and 22 pertain to the alleged conspiracy to murder Mr. Falcaro and the murders of Messrs. Falcaro and Daoud.

Federal Rules of Criminal Procedure, for acquittal on this civil rights count. The defendants argued that § 241 applies to conspiracies to deny citizens their constitutional rights and that the prosecution had failed to prove the American citizenship of Messrs. Falcaro and Daoud beyond a reasonable doubt. The government maintained that the protection afforded by § 241 is not limited to citizens, and accordingly that the citizenship of the victims is not an element of the offense. Judge Duffy agreed with the government, and ruled that § 241 protects all persons regardless of citizenship.

Judge Duffy noted that it was possible. that the Court of Appeals would disagree with this ruling, and therefore decided that he would ask the jury to return a special verdict on whether or not the government had proved the citizenship of Messrs. Falcaro and Daoud. However, Judge Duffy denied the government's request to reopen its direct case for the purpose of offering evidence of Mr. Falcaro's American citizenship which was available, namely his birth certificate.

Judge Duffy's charge explained to the jury that in his judgment 18 U.S.C. § 241 protects all persons lawfully within the United States, but since the law was unclear, it would be required to return a special verdict on the citizenship of Mr. Falcaro.[5] On appeal the Second Circuit determined that as a matter of law "United States citizenship is a necessary element of proof under 18 U.S.C.

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[5] The evidence adduced at trial showed that Mr. Daoud was a Jordanian citizen.

§ 241." *United States v. Gaggi*, 811 F.2d 47, 58 (2d Cir.), *cert. denied*, 107 S. Ct. 3214 (1987).[6]

After reviewing the evidence submitted by the government on Mr. Falcaro's citizenship, the Court of Appeals concluded that it failed to satisfy the government's burden of proof.

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[6] The Second Circuit held that extension of § 241 to protect non-citizens was contrary to the language of the statute, the previous construction of § 241 by the Supreme Court in *Baldwin v. Franks*, 120 U.S. 678 (1887), and § 241's legislative history.

The Court of Appeals addressed an argument made by the government in support of its interpretation of § 241:

> [W]hile acknowledging *Baldwin*'s holding that the word 'citizen' in § 241 must be given the same meaning it has in the Fourteenth Amendment, the government, citing *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d 786 (1982), points to the fact that the Fourteenth Amendment's protections have been applied to aliens since the *Baldwin* decision. Therefore, the government argues, under *Baldwin* itself the word 'citizen' must now include 'aliens'.

U.S. v. Gaggi, 811 F.2d at 57. The Second Circuit found that the government's argument failed to recognize that the Fourteenth Amendment itself distinguishes between "persons" and "citizens": whereas the equal protection clause and the due process clause of the Fourteenth Amendment both use the word "person", the privileges and immunities clause uses the word "citizen". Since the *Plyler* case's teaching was that an alien is a "person" for purposes of the equal protection clause, it does not have any bearing on the holding of *Baldwin* that the term "citizen" as used in the predecessor statute to § 241 should be given the same meaning it has in the privileges and immunities clause of the Fourteenth Amendment. *Id.* at 57-58.

> The jury found that Falcaro was a United States citizen, but on the evidence presented, no rational jury could have found Falcaro to be a citizen beyond a reasonable doubt. In light of the scant trial evidence on this issue, we hold that it was insufficient as a matter of law to support the convictions of appellants Borelli and Ustica under § 241. Accordingly, those convictions must be reversed.[7]

Id. The Court of Appeals did not offer any guidance concerning the double jeopardy implications of its rulings.

II.

Messrs. Testa and Senter argue that since the Court of Appeals found the evidence presented at the first trial on count four to be insufficient to support the convictions of Messrs. Borelli and Ustica, principles of collateral estoppel and double jeopardy bar a second trial of them on this count.

The Supreme Court has refused to apply the doctrine of nonmutual estoppel in criminal cases. *Standefer v. United States*, 447 U.S. 10, 22-25 (1980). The petitioner in *Standefer* was charged, *inter alia*, with aiding and abetting an Internal Revenue Service official in accepting compensation unauthorized by the law and in violation of 26

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[7] The evidence going to Mr. Falcaro's citizenship was testimony of Mr. Falcaro's wife to the effect that her husband resided in Nassau County at the time of his death, paid state and federal taxes, and was licensed by New York State to be an automobile dealer.

U.S.C. § 7214 and 18 U.S.C. § 2. Prior to the filing of the indictment charging petitioner, the Internal Revenue Service official was acquitted of receipt of the unlawful compensation, the acceptance of which petitioner was accused of aiding and abetting. The *Standefer* Court rejected petitioner's claim that the doctrine of nonmutual estoppel should be applied to bar the government from relitigating the revenue official's guilt, and to give preclusive effect to the revenue official's acquittal. The Court took note of the differences between criminal and civil cases: in a criminal case, as a result of discovery rules, rules of evidence and constitutional privileges and rules of exclusion, the government does not necessarily have the kind of " 'full and fair opportunity to litigate,' that is a prerequisite of estoppel" in the civil setting. *Id.* at 22.

The Court in *Standefer* noted and rejected the argument that courts in criminal cases could conduct pre-trial hearings to determine whether the government had been deprived of a chance to present its case fully the first time around. It pointed out that a pre-trial hearing would not promote litigation economy, which is the purpose behind the concept of estoppel. It also stressed that a criminal case

> involves an ingredient not present in [civil cases]: the important federal interest in the enforcement of the criminal law. [Civil cases concern] disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.

Id. at 24.

Although this case is distinguishable from *Standefer*, the reasoning of *Standefer* is applicable. Accordingly, Messrs. Testa and Senter cannot avail themselves of the doctrine of nonmutual estoppel.

Nor can these defendants invoke the double jeopardy clause to bar their retrial on count four. As the Supreme Court confirmed in *Richardson v. United States*, 468 U.S. 317, 322-26 (1984) a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected:

> The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.

Id. at 326.

III.

In assessing whether double jeopardy bars retrial of Mr. Ustica, all are in agreement that the court's starting point must be *Burks v. United States*, 437 U.S. 1 (1978). In *Burks* the Supreme Court reviewed its holdings in a long line of cases involving double jeopardy, noting that the Court's decisions in this area "can hardly be characterized as models of consistency and clarity." *Id.* at 9.[8]

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[8] In *Burks* the defendant had argued insanity as a defense to a bank robbery charge. Before the case was submitted to the

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Burks carved an exception to the long accepted double jeopardy doctrine enunciated first in *United States v. Ball*, 163 U.S. 662 (1896), that a reversal on appeal of a conviction does not preclude retrial. *Burks* held that once a defendant obtained an unreversed appellate ruling that the government had failed to introduce sufficient evidence, the Double Jeopardy Clause of the Fifth Amendment prohibits retrial. The Court identified two rationales in support of its outcome.

Reasoning from the established doctrine that double jeopardy attaches to a judgment of acquittal, the Court stated that to distinguish between a judgment of acquittal and appellate reversal based on insufficient evidence would create a purely arbitrary distinction between those in the petitioner's position and others who would enjoy the benefit of a correct decision by the trial court. *Burks v. United States*, 437 U.S. at 11. "[S]uch an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16.

The second rationale identified in *Burks* was that the prosecution should not have "another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11. This rationale, according to the Court, is central to the objective of the double jeopardy clause. The failure to muster evidence is to be distinguished from trial error, which does not bar retrial:

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jury, the defendant made a motion for acquittal, which was denied. On appeal the conviction was reversed, because the appellate court found that the government had failed to rebut the defendant's proof of insanity.

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

Id. at 15. Unlike a reversal due to failure of proof at trial, in which case the prosecution has been given an opportunity to offer whatever proof it possessed, reversal because of trial error should not preclude retrial because "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* at 15. The *Burks* Court emphasized that its decision was limited to the situation in which "the prosecution cannot complain of prejudice [because] it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16. In footnote four the Court emphasized that *Burks* was not a case where the government was arguing that the trial judge had erroneously excluded evidence which, if admitted, would have cured the insufficiency.[9]

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[9] Defendant Ustica argues that this footnote is merely meant to distinguish this case from *Sanabria v. United States, infra.* At least one court has drawn this same conclusion. *See Webster v. Duckworth,* 767 F.2d 1206, 1214 (7th Cir. 1985), *cert. denied,* 475 U.S. 1032 (1986). If footnote four was intended only

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The same day that *Burks v. United States, supra,* was decided, the Supreme Court issued two other decisions dealing with double jeopardy issues: *Greene v. Massey,* 437 U.S. 19 (1978); and *Sanabria v. United States,* 437 U.S. 54 (1978).

Petitioner in *Greene v. Massey* sought a writ of habeas corpus, claiming that the state appellate court's order reversing his conviction barred his retrial. Because it was unclear whether the majority of appellate justices based their decision to reverse on the lack of evidence that the defendant committed murder in the first degree, or on trial error in the admission of evidence, the Court remanded the case to the Court of Appeals for the Fifth Circuit for a further determination of whether the appellate court's finding of insufficiency of evidence was based on the fact that certain items of evidence were inadmissible. In remanding, the Court specifically reserved the question of whether a defendant could be retried following an appellate finding of insufficiency of the evidence, if the prosecutor's evidence was insufficient only because the appellate court determined that certain portions of the evidence must be disregarded. 437 U.S. at 26 n.9.

In *Sanabria v. United States,* the Court found that retrial of Mr. Sanabria, after he had been acquitted by the trial judge pursuant to a motion under Rule 29, Federal

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to refer to *Sanabria,* it is unclear why it does not mention *Sanabria* directly since *Sanabria* was decided the same day as *Burks*. *Cf. Duffel v. Dutton,* 785 F.2d 131, 133 (6th Cir. 1986) (suggesting that footnote four is significant to the holding of *Burks*).

Rules of Criminal Procedure, was barred by double jeopardy, despite the fact that the acquittal for insufficient evidence was the result of an erroneous evidentiary ruling. "That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." 437 U.S. at 69.

In a case decided four years later, *Tibbs v. Florida*, 457 U.S. 31 (1982), the Court found that retrial of a defendant whose conviction had been reversed by an appellate court was not barred by the double jeopardy clause. The reversal in *Tibbs* was prompted by an appellate determination that the verdict was contrary to the weight of the evidence, and not by an appellate determination that the evidence was insufficient. *Tibbs* thus confirmed the vitality of the teaching of *United States v. Ball*, 163 U.S. 662 (1896), that "a criminal defendant who successfully appeals a judgment against him 'may be tried anew . . . for the same offence of which he had been convicted.' " *Tibbs v. Florida*, 457 U.S. at 39-40 (quoting *United States v. Ball*, 163 U.S. at 672). The *Tibbs* majority explained that *Burks v. United States, supra*, and *Greene v. Massey, supra*, carved a narrow exception from the longstanding understanding that a defendant who successfully appeals a conviction is subject to retrial. *Id.* at 40. The *Tibbs* majority opinion identified two considerations underlying the principle of *United. States v. Ball*: 1) that "society would pay too high a price 'were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.' " *Tibbs v. Florida*, 457 U.S. at 40 (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)); 2) that

"retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause." *Id.*

IV.

The crux of the question with respect to Mr. Ustica is whether the Second Circuit's reversal of Mr. Ustica's conviction was prompted by "trial error" or was the result of insufficient evidence.

In considering the validity of Mr. Ustica's conviction under 18 U.S.C. § 241, the Second Circuit first determined that the analysis of 18 U.S.C. § 241 urged by the government and adopted by Judge Duffy was incorrect. With this conclusion in hand, the Second Circuit turned to the remaining question: whether the government had demonstrated beyond a reasonable doubt that either Mr. Falcaro or Mr. Daoud was an American citizen. As already noted, the Circuit Court found that contrary to the jury's special verdict, the proof of Mr. Falcaro's American citizenship was insufficient. Judge Cardamone, writing for the panel, did not make any reference to how this reversal affected the defendants, rights pursuant to the double jeopardy clause. The government maintains that the insufficiency of the evidence as to Mr. Falcaro's citizenship should be deemed trial error since it was a consequence of Judge Duffy's denial of the government's application to reopen its case for the purpose of placing into evidence the birth certificate of Mr. Falcaro. The Second Circuit did not address this ruling by Judge Duffy, though presumably the entire record was before it. The government maintains that in order to arrive at a just result, this court should

look beyond the reversal for insufficient evidence and examine the reasons underlying the insufficiency and analyze the Second Circuit judgment of reversal as analogous to reversal based upon trial error.

Defendant Ustica, on the other hand, argues that the rule articulated in *Burks v. United States, supra,* that a defendant cannot be retried following an unreversed ruling that the prosecution failed to introduce sufficient evidence to support a conviction, is clearly applicable to his situation. Mr. Ustica condemns the government's attempt to label Judge Duffy's exclusion of the birth certificate as an evidentiary error. "The timing of the [the government's] request, [after it had rested] is extraordinarily significant, because as a result, Judge Duffy's ruling must now be reviewed under an abuse of discretion standard. The law is clear that the question of '[w]hether the government should be [be] permitted to reopen its case [is] a decision to be made in the sound discretion of the trial court.' " Defendant Ustica's memorandum at 7 (quoting United States v. Bennett, 709 F.2d 803, 806 (2d Cir. 1983), *cert. denied,* 469 U.S. 1075 (1984)).

Thus the issue is the manner in which the reversal of Mr. Ustica's conviction under § 241 fits within the double jeopardy analysis set forth in *Burks v. United States.* As acknowledged by the Court in *Burks,* the law in this area is in a state of confusion.

While defendant Ustica's argument has much to recommend it,[10] the retrial of Mr. Ustica would not offend

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[10] One argument raised by Mr. Ustica which merits attention concerns *Sanabria v. United States,* which found that an

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the principles underlying the double jeopardy clause as identified in *Burks*. First, The double jeopardy clause attaches special weight to judgments of acquittals and to reversals on appeal for insufficiency of evidence as compared to reversals for trial error, which imply nothing about the guilt or innocence of the defendants. *Burks v. United States*, 437 U.S. at 15. Second, the clause's protections prevent the prosecutor from having a second chance to supply evidence against the defendant which it did not produce at the first trial: "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs v. Florida*, 457 U.S. at 41.

Given the request of the government, albeit belated, to offer into evidence Mr. Falcaro's birth certificate, the reversal by the Court of Appeals cannot be considered a reflection on Mr. Ustica's guilt or innocence. It is clear that the limited evidence of Mr. Falcaro's citizenship introduced at trial was not all the proof of citizenship that the government had been able to "muster". Therefore

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acquittal by a trial judge, even if based on an erroneous evidentiary ruling, operates as a bar to retrial. It does seem anomalous to find that in one situation, reversal on appeal, a second trial will be allowed because an evidentiary ruling limited the government's case, but to find in another situation, acquittal at trial, that a second trial is forbidden even though the acquittal was the result of an erroneous evidentiary ruling. One court has suggested that the two situations are distinguishable because double jeopardy law places very different meanings on acquittals and reversals on appeal. *See Webster v. Duckworth*, 767 F.2d 1206, 1215 (7th Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986).

retrial in this case would not be contrary to the central purpose of the double jeopardy clause as described in Burks: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U.S. at 11.

Nor do the facts in this case suggest that a second trial will provide the government with an opportunity for official abuse or bad faith prosecution. There is no risk that by allowing the government a second chance to present its evidence, it will "obtain conviction solely through its persistence." *Tibbs v. Florida*, 457 U.S. at 43. Clearly the government has not attempted to harass the defendant by trying him piecemeal. *See United States v. Tranowski*, 702 F.2d 668, 671 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984).

In my view the *Burks* division of reversals into two distinct worlds of "trial error" and "insufficiency of evidence" is not applicable to the instant case. The government here was not permitted to introduce all of its evidence; even though Judge Duffy's ruling excluding the government's offer of evidence cannot amount to trial error, it did prejudice the government. Accordingly, this case presents a situation where the government was precluded from introducing all of its evidence by the decision of the trial court. The factual assumption in *Burks* seems to have been that the prosecution simply failed to produce sufficient evidence of guilt, not that it produced such evidence but was prevented by the trial court from introducing it. *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). The record before me in this case clearly does not support a similar assumption. Although the government

failed to produce sufficient evidence of Mr. Falcaro's citizenship, the failure was in part due to the trial court's ruling. Defendant Ustica is correct that Judge Duffy's ruling excluding Mr. Falcaro's birth certificate cannot be deemed erroneous. However, it is also true that it would have been well within Judge Duffy's discretion to allow the additional evidence to be placed before the jury. The introduction of evidence by the government after it has rested its case has been upheld where there was no surprise to the defendants and where the evidence would not be more detrimental to the defendants because of the order of its admission. *United States v. Williams*, 336 F.2d 183 (2d Cir.), *cert. denied*, 379 U.S. 827 (1964); *Webb v. United States*, 533 F.2d. 391, 395 (8th Cir. 1976).[11]

Other courts, though not faced with the identical issue, have found that *Burks* does not bar retrial whenever a reversal stems from insufficient evidence. Several courts have suggested that if the evidence admitted is sufficient to support a conviction, but it is determined on appeal that some of the evidence should have been excluded and what remains insufficient to support a conviction, *Burks* does not preclude a new trial. *United States v. Bibbero*, 749 F.2d 581, 586 & n.3 (9th Cir. 1984), *cert.*

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[11] I am confident that had Judge Duffy anticipated the Second Circuit's ruling, he would have allowed the government to introduce Mr. Falcaro's birth certificate into evidence. Though Judge Duffy recognized that the Court of Appeals might differ with his analysis of § 241 and therefore did provide for the jury to return a special verdict on the citizenship of Mr. Falcaro, it seems evident that his refusal to allow the introduction of the birth certificate, in part, stemmed from his analysis of § 241.

denied, 472 U.S. 1009 (1985); *United States v. Tranowski*, 702 F.2d 668 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Sarmiento Perez*, 667 F.2d 1239, 1240 (5th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Harmon*, 632 F.2d 812, 814 (9th Cir. 1980); *United States v. Mandel*, 591 F.2d 1347, 1371-74, rev'd en banc on other grounds, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Admittedly this case presents a harder issue than those analyzed in the preceding cases. *See Webster v. Duckworth*, 767 F. 2d 1206, 1215 (7th Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986). However, the reasoning of the foregoing cases in deciding that Burks does not bar retrial when reversal for insufficiency of evidence stems from the improper admission of evidence, should also be applicable when available evidence has been kept out by action of the trial court.

> Reversal for failure to suppress evidence involves only a determination that the trial process was defective in a material respect, and implies nothing as to the sufficiency of the evidence of guilt of the defendant. . . . It would prolong trials unduly to adopt a rule that would require the government to introduce all available evidence and assert every possible legal theory in anticipation of reversal of trial court rulings admitting evidence. Moreover,
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> > it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the

> practice of retrial serves the defendants' rights as well as society's interest.

United States v. Harmon, 632 F.2d 812, 814 (9th Cir. 1980) (quoting *United States v. Tateo*, 377 U.S. 463, 466 (1964)).

My conclusion that the government may proceed to retry Mr. Ustica on count four of the indictment is buttressed by the posture of this case. Defendant Ustica is facing trial on other counts of this indictment which charge participation in a racketeering enterprise and participation in a racketeering conspiracy through a pattern of racketeering activity in which the murders of Messrs. Falcaro and Daoud, and the conspiracy to murder Mr. Falcaro, are set forth as predicate acts.[12]

SO ORDERED.

/s/ Vincent L. Broderick
VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
December 30, 1987

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[12] The result reached here avoids an anomaly: Testa and Senter, with respect to whom the jury hung on this count in the trial before Judge Duffy, will be retried on count four. If I accepted Mr. Ustica's arguments, the result would be that the defendant whom the jury unanimously found guilty would be shielded from a second trial, whereas those defendants with respect to whom the jury was not unanimous would be forced to endure a second trial. Though inconsistent results are not unknown in this nation's jury system, *Standefer v. United States*, 447 U.S. at 25, such a scenario certainly would not be consistent with the appearance of justice. *Id.*

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of March one thousand nine hundred and ninety-two.

UNITED STATES OF AMERICA,

Appellee,

DOCKET NUMBER: 89-1458(L)
(Filed March 16, 1992)

V.

SALVATORE MANGIANLINO,
et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellants, Salvatore Mangianlino, Anthony Senter and Joseph Testa.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk